

EXPLANATORY DOCUMENT

The Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014

Draft Order to improve the efficiency of public functions in relation to the inspection and monitoring of prisons in Scotland by amending, primarily, the Prisons (Scotland) Act 1989¹ and the Prisons and Young Offenders Institutions (Scotland) Rules 2011².

CHAPTER 1: INTERPRETATION

1.1. The following terms are used in this document:

“the 1989 Act” means the Prisons (Scotland) Act 1989;

“the 2010 Act” means the Public Services Reform (Scotland) Act 2010;

“the Chief Inspector” means Her Majesty’s Chief Inspector of Prisons for Scotland;

“IPM” means an independent prison monitor;

“LPC” means a legalised police cell which has been declared as such under section 14 of the 1989 Act;

“LPCVCs” means the visiting committees constituted for legalised police cells in accordance with the section 8, read alongside section 14(8), of the 1989 Act and rule 155 of, and Schedule 3 to, the Prison Rules;

“NPM” means the National Preventative Mechanism. States that ratify OPCAT are required to designate an NPM- a body or group of bodies that regularly examine the treatment of detainees;

“OPCAT” means the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that was adopted by the UN General Assembly on 10 December 1984;

“PMC” means a prison monitoring co-ordinator;

“the Prison Rules” means the Prisons and Young Offenders (Scotland) Institution Rules 2011;

“Prison Visiting Committees (PVCs)” means the visiting committees constituted for prisons or young offenders institutions in accordance with the sections 8 and 19(3) of the 1989 Act and rule 146 of, and Schedule 2 to, the Prison Rules;

“SPT” means the Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment established under Article 2 of OPCAT.

CHAPTER 2: INTRODUCTION

2.1. This Explanatory Document has been prepared in respect of the draft Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014 (“the Draft Order”), which is to be made in exercise of powers conferred by sections 14 and 15 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”).

¹ 1989 c 45
² SSI 2011/331

2.2. On 4th October 2013, the Scottish Ministers opened a consultation (“the first consultation”). This consultation was in relation to the proposals contained in a proposed draft Order (then called “the Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014). The proposed draft Order and a proposed Explanatory Document were laid before the Scottish Parliament in accordance with section 26(2) of the 2010 Act. In the light of representations received over the course of the first consultation, a number of amendments were made to the proposed draft Order.

2.3. On 19th September 2014, the Scottish Ministers opened a further consultation (“the second consultation”) on the terms of the proposed draft Order in accordance with section 26(4) of the 2010 Act and this consultation closed on 13th October 2014. The Scottish Ministers have considered the responses received over the course of the second consultation and some further changes have been made to the proposed draft Order. The Scottish Ministers do not consider that a further consultation is required in terms of section 26(4) of the 2010 Act as the changes made following the second consultation are minimal. Accordingly, this explanatory document has been prepared in order to be laid along with the draft Order in accordance with section 25(2) of the 2010 Act.

2.4. The Explanatory Document, which must be laid before the Scottish Parliament under section 25(2)(b) along with the Draft Order, must contain the details set out in section 27(1) of the 2010 Act. In light of the earlier consultations and the changes made to the Draft Order in light of those consultations, this proposed Explanatory Document now includes:

- An explanation of the powers under which the amended provisions contained in the Draft Order are made (section 27(1)(a) of the 2010 Act);
- An introduction to the amended provisions and the reasons for those provisions (section 27(1)(b) of the 2010 Act);
- An explanation as to why the Scottish Ministers believe that the conditions in section 16(2) and (10) are satisfied (section 27(1)(c)(i) of the 2010 Act);
- An explanation as to how the amended provisions made by the Order would improve the exercise of public functions (section 27(1)(c)(ii) of the 2010 Act);
- A description of the functions delegated to the Scottish Ministers and the part of the Scottish Administration through which the functions are to be exercised (section 27(1)(c)(iii) of the 2010 Act);
- A statement of, and the reasons for, the functions of legislating conferred by the Draft Order and the procedural requirements attaching to the exercise of those functions (section 27(1)(e) of the 2010 Act);
- The details of the consultations undertaken under section 26, the representations received as a result of those consultations and the changes made to the Draft Order as a result of those representations (section 27(1)(f) of the 2010 Act).

2.5. The overarching purpose of the Draft Order is to improve the efficiency of public functions in the inspection and monitoring of prisons in Scotland by-

- modifying the functions of the Chief Inspector;
- enshrining in domestic legislation that the inspection and monitoring of prisons is in pursuance of the objective of the Optional Protocol to the Convention Against Torture adopted by the United Nations in December 2002 (OPCAT);
- creating the roles of Prison Monitoring Co-ordinators (PMCs) and Independent Prison Monitors (IPMs) on which the functions of independent prison monitoring are being conferred. (In the original proposed draft Order these roles were referred to as Prison Monitors and Lay Monitors but the new titles will be used throughout this Explanatory Document);
- establishing the process for appointing PMCs and IPMs;
- providing for the functions of PMCs including support, training and oversight of IPMs;
- providing for the functions of IPMs including arrangements for visits to prisons and monitoring prison conditions and the treatment of prisoners within the prison;
- placing a duty on prison governors to assist the Chief Inspector, PMCs and IPMs to allow them to exercise their functions in relation to the prison;
- providing for the establishment of a Prison Monitoring Advisory Group and its functions;
- providing that Scottish Ministers must make arrangements for visits by members of the Sub Committee for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment established under Article 2 of OPCAT; and
- abolishing Prison Visiting Committees (PVCs) and legalised police cell visiting committees (LPCVCs);

2.6. The role of the Chief Inspector derives from section 7 of the Prisons (Scotland) Act 1989 ("the 1989 Act"). In terms of section 7, it is the duty of the Chief Inspector to inspect or arrange the inspection of prisons in Scotland and to inspect the conditions in which prisoners are transported or held in pursuance of prisoner escort arrangements. The Chief Inspector must report to the Scottish Ministers on these inspections and, in particular, on the treatment of prisoners and the conditions in prisons. The Chief Inspector must also prepare an annual report to the Scottish Ministers which must be laid before Parliament.

2.7. PVCs have been in existence for some considerable time but their current legislative basis is found in section 8 of the 1989 Act. Section 8 obliges the Scottish Ministers to provide for the continuation of PVCs in rules made under section 39 of the 1989 Act. The rules must provide, in particular, that PVCs are to be appointed by such community justice authorities or local authorities and in such manner as may be prescribed in the rules. The main functions of PVCs under the 1989 Act are for their members to frequently visit prisons and hear any complaints that may be made by prisoners. PVC members must report matters to the Scottish Ministers as they see appropriate and they must be given free access to prisons and prisoners at any time.

2.8. Part 17 of, and Schedule 2 to, the Prison Rules set out provisions for the constitution of PVCs, the proceedings of PVCs, the functions of PVCs and the duty to provide an annual report to the Scottish Ministers. Schedule 2 lists the local authorities that are responsible for the constitution of each PVC, the number of PVC members each local authority must appoint and the number of members who must not also be members of that local authority.

2.9. Visiting committees must also be appointed for legalised police cells in accordance with section 8 of the 1989 Act, read alongside section 14(8). The rules governing the constitution and functions of PVCs are applied to LPCVCs with some modifications by rule 155 of the Prison Rules. The provisions of Schedule 2 to the Prison Rules are replicated in relation to LPCVCs in Schedule 3. LPCVCs are being replaced by Independent Custody Visitors appointed in accordance with section 94 of the Police and Fire Reform (Scotland) Act 2012. The Draft Order accordingly provides for the abolition of visiting committees for legalised police cells.

2.10. In his [Review of Proposals to Improve Arrangements for Independent Monitoring of Prisons](#), Professor Andrew Coyle recommended that Visiting Committees should be replaced with a new system of voluntary independent monitors, to be appointed thorough a transparent process for specified periods and with a clearly defined role.

2.11. Professor Coyle stated that current arrangements for independent prison monitoring in Scotland do not meet the standards required by the Optional Protocol to the UN Convention Against Torture (OPCAT), but noted that, if his recommendations were implemented, Scotland would in future have a robust system for independent monitoring. The Scottish Government made a commitment to take forward reform of the system for the independent monitoring of prisons which would meet the Government's obligations under OPCAT and in accordance with the National Preventive Mechanism (NPM).

2.12. The new independent prison monitoring service will sit under the auspices of the Chief Inspector. The Scottish Government recognises the distinction between the functions of inspection and monitoring but believes that bringing both areas under the leadership of the Chief Inspector provides an opportunity to integrate functions where appropriate, whilst also preserving the distinction between the two. The Chief Inspector will oversee the independent monitoring of prisons but the inspection and monitoring functions will operate separately. The Chief Inspector is also a member of the NPM.

2.13. It is proposed that the 1989 Act is amended to provide greater clarity to the Chief Inspector's role. The proposal is also to create, in the 1989 Act, the role of PMCs to ensure the effective monitoring of each prison to which the PMC is assigned. PMCs are to be appointed by Scottish Ministers and their performance is to be evaluated by the Chief Inspector. The role of IPMs is also to be created in the 1989 Act to undertake the day to day monitoring of prison conditions and the treatment of prisoners. IPMs are to be appointed, and their performance evaluated, by PMCs. As the functions of PVCs are being conferred on PMCs and IPMs, all references to PVCs are being removed from the 1989 Act and the Prison Rules.

2.14. This Explanatory Document provides a formal assessment of the Draft Order against the requirements of the 2010 Act, and is arranged as follows:

- Chapter 3 sets out the background to the Draft Order and provides an overview of the proposals; and
- Chapter 4 explains how the requirements of sections 16 (preconditions) and 27 (explanatory document) of the 2010 Act are met.
- Chapter 5 provides details of the first consultation, the representations received as a result of the first consultation and the changes made to the Order following the first consultation; and
- Chapter 6 provides details of the second consultation, the representations received as a result of the second consultation and the changes made to the Order following the second consultation.

CHAPTER 3: BACKGROUND TO THE DRAFT ORDER

The history of Prison Visiting Committees

3.1. The prison system in Scotland in its current form dates from 1878 when the Prisons (Scotland) Act 1877 came into force and the administration of prisons became the responsibility of central government. A Prison Commission was set up to administer prisons in Scotland on behalf of the Secretary of State and a Visiting Committee, consisting of commissioners of supply, justices of the peace and magistrates, was appointed for each prison. The Secretary of State regulated the number of members on an annual basis. Members of the committees were required to visit the prison frequently and to hear any complaints made to them by prisoners. There was to be no restriction on any committee member from visiting any part of the prison or any prisoner at any time.

3.2. Regular monitoring of conditions in prison and the treatment of prisoners is currently undertaken by Prison Visiting Committees. Members of the PVC are appointed for each prison and undertake this work on a voluntary basis. The statutory arrangements for Visiting Committees have changed little since their enactment other than to take account of local government changes in terms of the appointment of members. Under the current arrangements Local Authorities appoint Visiting Committee members for adult establishments and members for Young Offenders Institutions are appointed by the Cabinet Secretary for Justice.

3.3. A number of police cells in Scotland are “legalised” for prisoners. The purpose of Legalised Police Cells is to hold prisoners where it is not possible to take them immediately from Court to the prison in which they are to be detained. Regular monitoring of legalised police cells is undertaken by a Visiting Committee constituted for that purpose.

The current role of Prison Visiting Committees

3.4. The Scottish Ministers are obliged, in terms of section 8 of the 1989 Act, to make provision for the appointment of, and the conferral of functions on, PVCs in rules made under section 39 of the 1989 Act. By virtue of section 19(3) of the 1989

Act, the Scottish Ministers are obliged to appoint Visiting Committees for remand centres and Young Offenders' Institutions and the Ministers may prescribe, in rules under section 39, the minimum number of women who should be members of these Visiting Committees.

3.5. Section 8 of the 1989 Act is as follows:

- (1) Rules made under section 39 of this Act shall provide for the constitution, for prisons, of Visiting Committees appointed,
 - (a) by such-
 - (i) community justice authorities, or
 - (ii) councils constituted under section 2 of the Local Government etc. (Scotland) Act 1994,
 - (b) at such times,
 - (c) in such manner, and
 - (d) for such periods,as may be prescribed by the rules.
- (2) Rules made under section 39 of this Act shall prescribe the functions of Visiting Committees, and shall among other things require the members to pay frequent visits to the prison and hear any complaints which may be made by the prisoners and report to the Secretary of State any matter which they consider it expedient to report; and any member of a visiting committee may at any time enter the prison and shall have free access to every part thereof and to every prisoner.
- (3) The Secretary of State may pay-
 - (a) to the members of any visiting committee appointed under or in pursuance of this section such allowances in respect of loss of earnings or travelling or subsistence or other expenses necessarily suffered or incurred in the performance of their duties, and
 - (b) to the officers of any such committee such remuneration (whether by way of salary or fees) and such allowances in respect of travelling or subsistence expenses,as the Secretary of State may with the consent of the Treasury determine.

3.6. Section 19(3) of the 1989 Act is as follows:

- (3) The Secretary of State shall appoint for every remand centre and young offenders institution a visiting committee of which not less than two members shall be justices of the peace and not less than such number of members as may be prescribed by rules under section 39 of this Act shall be women.

3.7. Section 14 of the 1989 Act provides for the designation by the Scottish Ministers (by operation of section 53 of the Scotland Act 1998) of LPCs for the purpose of detaining prisoners before, during and after trial. Section 14(8) provides that for the purposes of sections 8 and 39 of the 1989 Act, LPCs are to be deemed to be prisons. This means that the obligations on Ministers to constitute visiting

committees for prisons and provide for their functions in Prison Rules also apply in relation to LPCs.

3.8. Part 17 of the Prison Rules makes provision for the constitution and functions of PVCs. Rule 146 of the Prison Rules provides for PVCs to be constituted for the prisons specified in Schedule 1 to the Prison Rules with the members of each PVC to be appointed by the local authorities specified in Schedule 1. There is a fixed number of members of each PVC who must not be members of the relevant local authorities. Rule 146(7) provides for the cessation of membership of a PVC - PVC members cease to hold office in the event of their resignation, the termination of their membership by the relevant local authority or, where applicable, the cessation of their membership of the local authority.

3.9. Rule 148 makes provision for the proceedings of PVCs. PVCs must elect a chair and a clerk and the names of the members of the PVC (and any change in those details) must be reported to the Scottish Ministers. PVCs must meet at least once every three months and they may set up, and delegate specific duties to, sub-committees of its membership.

3.10. The main functions of PVCs are set out in rules 149 to 151. PVCs must co-operate with the Scottish Ministers and the Governor of the relevant prison in promoting the efficiency of the prison. PVCs must also-

- inquire into and report upon any matter at the request of the Scottish Ministers;
- immediately bring to the notice of the Governor any circumstances relating to the administration of the prison or the condition of any prisoner which appear to be expedient to report for the Governor's consideration;
- bring such circumstances to the notice of the Scottish Ministers if it appears to the PVC that the Governor has not remedied any matter which the PVC has notified to the Governor within such period as appears to the committee to be reasonable.
- from time to time, inquire into the state of the prison premises;
- inspect, in particular, the food and drink provided to prisoners; and
- in relation to any such inquiry into the state of the prison premises-
 - (a) record particulars of every visit made, together with any deficiencies found during such visits, in the committee's minute book; and
 - (b) promptly send a copy of such particulars to the Scottish Ministers and to the Governor;
- discharge such other duties as the Scottish Ministers may from time to time assign to it;
- hear and investigate any complaints made to the PVC (or a member of the PVC);
- record particulars of the PVC's findings in relation to its investigation of a prisoner's complaint in its minute book,
- promptly send a copy of such findings to the Scottish Ministers and to the Governor of the relevant prison and inform the prisoner concerned of its findings.
- ensure that at least two members of the visiting committee for a prison must visit the prison at least fortnightly so that, in every fortnight, at least-

- (a) one member visits the prison weekly; or
- (b) two members visit the prison together in that fortnight.

3.11. Under rule 152, PVCs have the power to inspect prison records other than:

- personnel records;
- prisoners' records; and
- security manuals or other papers which have implications for security

3.12. PVCs are obliged to report to the Scottish Ministers annually on the state of the relevant prison and its administration in terms of rule 153. PVCs may also make suggestions and provide advice to Scottish Ministers in the annual report. Rule 154 prohibits PVC members from any direct financial interest in any contract for the supply of goods or services to a prison. Schedule 2 sets out which local authorities are to appoint the members of PVCs and in what numbers.

3.13. Rule 155 provides for the constitution of Visiting Committees for LPCs and applies the preceding provisions of Part 17 to those Visiting Committees subject to certain modifications. Schedule 3 sets out which local authorities are to appoint the members of LPCVCs and in what numbers.

The need for change

3.14. In his review, Professor Coyle recommended that PVCs should be replaced with a new system of voluntary independent monitors. At the moment arrangements for independent prison monitoring in Scotland do not meet the standards required by OPCAT and the system must be reformed to address this.

3.15. The Scottish Government is working to make external scrutiny proportionate, risk-based and co-ordinated so that potentially vulnerable service users are protected. Visiting Committees have played an important role in monitoring prisons and legalised police cells over many years, but changes to prison practices and developments in relation to OPCAT mean that the time is right to update the system of independent monitoring in Scotland. Visiting Committees work independently of each other and there is no co-ordination at a national level which is a barrier to identifying and examining issues across the prison system. Professor Coyle made a number of recommendations for improvements which the Scottish Government have accepted, and will implement.

Consultation

3.16. After publishing its response to Professor Coyle's review, the Scottish Government engaged with key organisations including the Association of Visiting Committees and HMCIPS.

3.17. The proposed draft Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014 was laid before the Scottish Parliament on 4 October 2013. The Public Services Reform (Scotland) Act 2010 under which the Order is to be made requires formal consultation on the proposals. The Scottish Government ran a consultation between 4 October 2013 and 31 January 2014 and 36 responses were received. These were analysed by an external contractor and [published on the](#)

[Scottish Government's website](#) on 25 April 2014. The Scottish Government's Consultation Report was published on the website on 19 September 2014.

3.18. The proposed draft Order was amended substantially in light of the responses received over the course of the first consultation and the Scottish Government ran a further consultation on the amended proposed draft Order from 19 September to 13 October 2014. 30 responses were received over the course of this further consultation and 2 were received after the consultation closed. The Scottish Government are currently preparing their Consultation Report. A number of relatively minor changes were made to the proposed draft Order in light of the responses received.

Overview of the Proposals

3.19. The Draft Order provides that the inspection and monitoring of prisons is in pursuance of the objective of OPCAT which is the establishment of a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

3.20. The Draft Order will modify the functions of the Chief Inspector to provide greater clarity and will confer a number of additional functions on that role. The Chief Inspector will be tasked with preparing and publishing guidance on the monitoring of prisons and evaluating the performance of PMCs. The Chief Inspector will be given a **power** to provide a report to Scottish Ministers on any matter relating to prisons, prisoners or independent prison monitoring which will sit alongside the **duty** to report to the Scottish Ministers. The powers and duties of the Chief Inspector are to be set out clearly via amendments to section 7 of the 1989 Act.

3.21. New sections 7A and 7B will be added to the 1989 Act creating the role of PMC and conferring a number of powers and duties on that role. PMCs will be appointed by Scottish Ministers in consultation with the Chief Inspector and will have the core function of ensuring the effective monitoring of each prison to which the PMC is assigned. PMCs will be tasked with the administrative oversight of independent prison monitoring which includes the appointment, support, training and evaluation of IPMs. PMCs have a number of reporting duties to the Chief Inspector and are to be paid such salary and allowances as the Scottish Ministers consider appropriate.

3.22. New sections 7C and 7D will be added to the 1989 Act creating the role of IPMs and conferring a number of powers and duties on that role. IPMs will be appointed by PMCs in such numbers as the Chief Inspector considers appropriate and on such terms and conditions as the Chief Inspector may determine. IPMs will each be assigned to one prison and will have the core function of visiting that prison and monitoring prison conditions and the treatment of prisoners. IPMs have a number of reporting duties to the PMC and are to be paid such travel and subsistence expenses as the Scottish Ministers consider appropriate.

3.23. A new section 7E will be added to the 1989 Act which places a duty on the Governor to assist with prison inspections and monitoring. Under this section the

Governor must provide assistance to the Chief Inspector, PMCs and IPMs to allow them to exercise their functions under the Act.

3.24. A new section 7F will be added which provides for the establishment of a Prison Monitoring Advisory Group by the Chief Inspector. The composition of the Group is specified in section 7F(2) and the functions of the Group are specified in section 7E(4). The Advisory Group is to be tasked with keeping the effectiveness of independent prison monitoring, the Chief Inspector’s guidance and the training of IPMs under review. The Advisory Group must also contribute to the preparation of the guidance published by the Chief Inspector.

3.25. A new section 7G will be added to the 1989 Act to provide that Scottish Ministers must make arrangements to ensure that members of the Sub Committee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment can visit prisons, access information and monitor prison conditions and the treatment of prisoners.

3.26. The provisions of the 1989 Act relating to PVCs (and LPCVCs) will be repealed and the provisions relating to PVCs (and LPCVCs) in the Prison Rules will be revoked. However, the Draft Order makes a numbers of savings and transitional provisions which will enable PVCs (and LPCVCs) to conclude existing inquiries, investigations, complaints and reports by a later date. All of the changes mentioned above mean that a number of consequential amendments to other pieces of criminal justice legislation will be required and these are provided for in the Schedule to the Draft Order.

Timetable

3.27. It should be noted that all dates other than the formal consultation period are subject to change.

Event	Date
Introduction of the Draft Order to the Scottish Parliament for consideration	4 October 2013
Formal Consultation on the Draft Order	4 October 2013 – 31 January 2014
Consideration of comments	31 January 2014 – 31 August 2014
Consultation on the revised Draft Order	19 September 2014 – 13 October 2014
Consideration of comments on revised Draft Order	14 October 2014 -24 October 2014
Draft Order laid in the Scottish Parliament for approval	7 November 2014
Order approved and made on or before	19 December 2014

CHAPTER 4: REQUIREMENTS OF THE 2010 ACT

Legislative background

4.1. The procedure for making an Order under Part 2 of the 2010 Act is set out in section 25 of that Act. By virtue of section 25(2), an Order under section 14 of the Act cannot be made unless the Scottish Ministers have-

- consulted in accordance with section 26;
- following the consultation, laid before Parliament the draft Order and the explanatory document prepared in accordance with section 27; and
- the draft Order has been approved by Parliament.

4.2. Section 25(3) of the 2010 Act makes similar provision for Orders made under section 15. The key differences between subsections (2) and (3) are that, subject to one exception, the consultation exercise must be conducted under section 25(4) and the explanatory document must be prepared in accordance with section 25(5). The procedure in section 25(3) does not apply where the circumstances in section 25(7) apply. Section 25(7) caters for the situation where an order under section 15 only contains a provision removing an entry from Schedule 5 in accordance with section 15(2)(b). In those circumstances there is no need to consult in accordance with section 25(4) or prepare an explanatory document in accordance with section 25(5). Section 25(7) provides that, in these circumstances, the order is subject to negative procedure.

4.3. The only part of the Draft Order which is made under section 15 is the provision removing the entry for Visiting Committees from Schedule 5 via the power in section 15(2)(b). The Draft Order does add entries to Schedule 5 but this is done under the power in section 14(6)(a) and not the power in section 15(2)(a). Accordingly, section 25(7) applies to the Draft Order as, insofar as it is made under section 15, it only contains provision under section 15(2)(b). There is no obligation on the Scottish Ministers to consult under section 25(4) or prepare an explanatory document under section 25(5).

4.4. If the Draft Order only removed the entry from Schedule 5 it would be subject to negative procedure. However, the Draft Order also contains provisions made under section 14 and once an order under section 14 is laid before Parliament under section 25(3)(b) it is to be subject to affirmative procedure. Section 33 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that separate powers to make subordinate legislation by affirmative and negative procedure may be exercised in the same Scottish statutory instrument and that instrument will be subject to the affirmative procedure. As a result, the Draft Order is subject to the affirmative procedure.

4.5. Section 26(1) of the 2010 Act requires the Ministers, where they propose to make a section 14 Order, to consult-

- (a) such organisations as appear to them to be representative of interests substantially affected by the proposals,
- (b) where the proposals relate to the functions of one or more persons, bodies or office-holders, those persons, bodies or office-holders, or persons appearing to them to be representative of those persons, bodies or office-holders,
- (c) in such cases as they consider appropriate, the Scottish Law Commission, and
- (d) such other persons as they consider appropriate.

4.6. For the purposes of the section 26(1) consultation the Ministers must-

- (a) lay before the Parliament a copy of the proposed draft order, and a copy of the proposed explanatory document referred to in section 25(2)(b)(ii) (excepting the details required by section 27(1)(f)),
- (b) send a copy of the proposed draft order and proposed explanatory document to any person to be consulted under section 26(1), and
- (c) have regard to any representations about the proposed draft order that are made to them within 60 days of the date after laying before Parliament.

4.7. The provisions dealing with the explanatory document are set out in section 27 of the 2010 Act. The proposed explanatory document laid before Parliament at the start of the 60 day consultation period must, for the purposes of an Order made under section 14 of the Act, include the information required in paragraphs (1) to (4) below. The actual explanatory document, which must be laid in Parliament along with the final version of the section 14 Order following the 60 day consultation period, must include the information required in paragraphs (1) to (5) below:

- (1) explain under which power(s) in the Act the provision contained in the draft order is made (section 27(1)(a));
- (2) introduce and give reasons for the provision (section 27(1)(b));
- (3) in the case of an order under section 14-
 - (a) explain why the Scottish Ministers consider that the conditions in section 16(2) (where relevant) are satisfied or the condition in section 16(10) is satisfied;
 - (b) explain how the provision made by the order would improve the exercise of public functions; and
 - (c) if the order relates to the functions of the Scottish Ministers, or confers functions on or transfers or delegates functions to, the Scottish Ministers, describe the functions and identify the part of the Scottish Administration through which the functions are, or are to be, exercised (section 27(1)(c));
- (4) identify and give reasons for-
 - (a) any functions of legislating conferred by the order, and
 - (b) the procedural requirements attaching to the exercise of those functions (section 27(1)(e)); and
- (5) give details of-
 - (a) any consultation undertaken under section 26,
 - (b) any representations received as a result of the consultation,

- (c) the changes (if any) made to the proposed draft order as a result of those representations (section 27(1)(f)).

Section 27(1)(a): The powers under which the provisions are made.

4.8. The Draft Order is made under sections 14 and 15 of the 2010 Act. The Draft Order is designed to improve the exercise of the public functions of inspecting and monitoring prisons (and monitoring legalised police cells) in accordance with section 14(1) of the 2010 Act.

4.9. Public functions are the functions of those persons, bodies and office-holders listed in Schedule 5 to the 2010 Act (see section 14(2) of the Act). The function of inspecting prisons is a public function as it is a function of the Chief Inspector and, as an office-holder in the Scottish Administration, the Chief Inspector is listed in Schedule 5 to the Act. The function of monitoring prisons and legalised police cells is a public function as it is a function of visiting committees who are also listed in Schedule 5 to the Act. The entry for “visiting committees” in Schedule 5 incorporates visiting committees for both prisons and legalised police cells.

4.10. Article 2(2) of the Draft Order adds new section 6A to the 1989 Act which outlines that the provisions of sections 7 to 7G of the 1989 Act are in pursuance of the objective of OPCAT, that is the objective of establishing a system of regular visits undertaken by independent, international and national bodies to places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. This is a modification of the functions of the Chief Inspector in accordance with section 14(3)(a) of the 2010 Act as it provides an overarching purpose for prison inspection. Similarly, this is a conferral of a function on PMCs and IPMs also in accordance with section 14(3)(a) as it constitutes an overarching purpose for independent prison monitoring.

4.11. Article 2(3) and (4), of the Draft Order modifies the functions of the Chief Inspector and confers additional functions on the Chief Inspector all in accordance with section 14(3)(a) of the 2010 Act.

4.12. Article 2(4) of the Draft Order creates the roles of PMCs and IPMs and confers functions upon them in accordance with section 14(3)(a) and (c) of the 2010 Act.

4.13. Article 2(3) and (4) of the Draft Order modifies the functions of Scottish Ministers and confers further functions on the Scottish Ministers all in accordance with section 14(3)(a) of the 2010 Act.

4.14. Article 2(4) confers functions on prison governors in accordance with section 14(3)(a) of the 2010 Act.

4.15. Article 2(5) to (10) of the Draft Order amends the 1989 Act so as to abolish all the functions of PVCs (and LPCVCs) in the 1989 Act and transfer certain functions to IPMs all in accordance with section 14(3)(a). Article 2(8)(b) restates section 19(4) of the 1989 Act so as to make it more easily understood in light of the amendments being made to the 1989 Act and this complies with the precondition in section 16(10) of the 2010 Act.

4.16. Article 3 of the Draft Order contains provision adding PMCs, IPMs and the prison monitoring advisory group to, and removing visiting committees (for both prisons and legalised police cells) from, Schedule 5 to the Act in accordance with section 14(6)(a) and 15(2)(b) of the 2010 Act.

4.17. Article 4 of the Draft Order modifies the Prison Rules so as to abolish the functions conferred on PVCs in the Prison Rules, transfer some of those functions to IPMs and confer further functions on IPMs all in accordance with section 14(3)(a) of the 2010 Act. Article 4 also modifies the Prison Rules so as to abolish the functions conferred on LPCVCs in the Prison Rules in accordance with section 14(3)(a) of the 2010 Act.

4.18. Articles 2 to 4 of the Draft Order modify a number of enactments, and an instrument, all in accordance with section 14(7)(a) of the 2010 Act. Articles 5 and 6 together with the Schedule make a number of consequential, incidental, transitional, and savings provisions in accordance with section 14(7)(b) of the 2010 Act. Article 5 also makes a change to Schedule 8 to the 2010 Act under the powers in section 14(7)(a) of the Act.

Section 27(1)(b): Introduction to the provisions and reasons for them.

Purpose of inspection and monitoring of prisons

4.19. The Draft Order adds new section 6A to the 1989 Act which provides that sections 7 to 7G of the 1989 Act are in pursuance of the objective of OPCAT – the establishment of a system of regular visits by independent bodies to places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment. This provision reflects that provided for independent custody visitors in section 93 of the Police and Fire Reform (Scotland) Act 2012 and is intended to provide an overarching purpose for the inspection and monitoring of prisons.

The Chief Inspector

4.20. The Draft Order modifies section 7 of the 1989 Act to clarify the existing functions of, and confer further functions on, the Chief Inspector. The Chief Inspector continues to have responsibility for the inspection of both prisons and the treatment of prisoners in Scotland and this is clarified by adding an express obligation to inspect the arrangements for temporary release of prisoners. Section 7 of the 1989 Act as amended by the Draft Order will contain provision for the Scottish Ministers to pay such sums as they consider necessary to the Chief Inspector in respect of salary and allowances and the performance of the Chief Inspector's functions. It also contains a provision for the Scottish Ministers to provide staff, property or services to assist the Chief Inspector in the exercise of the Chief Inspector's functions. The most significant new function given to the Chief Inspector is the oversight of independent prison monitoring in Scotland.

4.21. The amendments to section 7 of the 1989 Act provide the basis for the Chief Inspector's role in overseeing independent prison monitoring. Section 7(2) of the 1989 Act (as amended) will oblige the Chief Inspector to prepare and publish

guidance on the monitoring of prisons in Scotland and evaluate the performance of PMCs. The Chief Inspector will also be given a power and a duty to report to the Scottish Ministers in relation to independent prison monitoring by IPMs. The reports on independent prison monitoring prepared by the Chief Inspector (under section 7(3)(c)(ii)) and PMCs (under section 7B(6)(b) and (c)) are also to be laid before Parliament.

4.22. The Chief Inspector's role in the oversight of independent prison monitoring is further clarified in new sections 7A to 7F of the 1989 Act which are added by Article 2(4) of the Draft Order. The Chief Inspector must be consulted by the Scottish Ministers in the appointment of PMCs (section 7A(3)) and is tasked with assigning PMCs to prisons (section 7A(6)). The Chief Inspector may also determine the numbers of IPMs to be appointed by PMCs (section 7B(2)(a)) and the terms and conditions on which they are appointed (section 7C(1)).

4.23. The Chief Inspector may refer matters to PMCs in order for those matters to be investigated by IPMs (section 7B(2)(d)) and may instruct PMCs when to visit prisons (section 7B(2)(i)). The Chief Inspector is to receive reports from PMCs and may direct the form and manner of some of those reports (section 7B(7)). The Chief Inspector has a general power to instruct PMCs (section 7(2)(e)) and the Chief Inspector's guidance must be taken into account by PMCs and IPMs (section 7B(4)(b) and 7D(5)(c)). The Chief Inspector must establish a Prison Monitoring Advisory Group to, inter alia, keep the effectiveness of independent prison monitoring under review (section 7F).

4.24. The amendments to section 7 of the 1989 Act are necessary to clarify the existing obligations of the Chief Inspector and to confer the function of overseeing independent prison monitoring on the Chief Inspector. Taking into consideration Professor Coyle's recommendations, the Cabinet Secretary for Justice believes that the Chief Inspector is best placed to oversee future independent monitoring of prisons. Bringing independent prison monitoring under the auspices of the Chief Inspector provides an opportunity to integrate scrutiny and monitoring effectively, in a way that preserves the distinct functions of both. It will also enhance the impact and profile of monitoring, given the Chief Inspector's access to Ministers, Parliament and the media.

4.25. Having the Chief Inspector responsible for overseeing and supporting the monitoring regime provides the best potential for impact and ensuring high standards in prisons in Scotland. It introduces oversight and leadership from an individual already working in this field, and adding monitoring to the Chief Inspector's responsibilities is a natural move which plays to existing strengths.

Prison Monitoring Co-ordinators

4.26. The role of PMC is introduced in the new sections 7A and 7B to be added to the 1989 Act. The new section 7A(2) and (3) provides that PMCs are to be appointed by the Scottish Ministers in consultation with the Chief Inspector and, under section 7A(6), PMCs are to be assigned by the Chief Inspector to such prisons as the Chief Inspector may determine. The new section 7A(4) and (5) also creates a regulation

making power for Ministers should they wish to create a formal appointment process for PMCs.

4.27. The powers and duties conferred on PMCs are set out in the new section 7B. The PMC's main objective is to ensure the effective monitoring of each prison to which they are assigned (section 7B(1)). In pursuance of this function, PMCs must, under section 7B(2), appoint, assign, support, evaluate and ensure the training of IPMs. PMCs must arrange for prison visits by IPMs in accordance with an agreed rota (section 7B(2)(c)) and this rota must ensure that prisons are visited by IPMs no less than once a week.(section 7B(3)). PMCs must refer matters to IPMs for investigation which have been referred to the PMC by the Chief Inspector (section 7B(2)(d)). PMCs must arrange twice yearly meetings of IPMs assigned to a prison and evaluate the performance of each IPM (section 7B(2)(g) and (h)). PMCs must visit prisons as instructed by the Chief Inspector and must keep records of these visits (section 7B(2)(i) and (j)).

4.28. PMCs must comply with the instructions of, and have regard to the guidance prepared by the Chief Inspector (section 7B(4)). PMCs have powers to visit prisons, speak to persons at the prison and examine prison records (section 7B(5)). PMCs have a duty to report to the Chief Inspector as detailed in section 7B(6) and a general power to notify the Chief Inspector as they consider appropriate (section 7B(8)). PMCs are to be paid a salary and allowances by the Scottish Ministers (section 7B(9)).

4.29. The creation of the role of PMC in the updated draft Order will ensure that essential oversight, co-ordination and support is provided to IPMs. The duties of the PMC will ensure that all aspects of prisons are monitored effectively; that a consistent approach to monitoring is taken throughout Scotland; that standards are maintained through evaluation of performance; and that there is support provided for IPMs.

Independent Prison Monitors

4.30. The role of IPM is introduced in the new sections 7C and 7D to be added to the 1989 Act. Section 7C makes provision in relation to the appointment of IPMs. The Chief Inspector may determine the terms and conditions of appointment (section 7C(1)) and the term of appointment and re-appointment are clarified in section 7C(2) and (3). Section 7D sets out the powers and duties conferred on IPMs. IPMs are given the core functions of visiting prisons and monitoring prison conditions, the treatment of prisoners and the temporary release arrangements for prisoners (section 7D(1)(a), (b) and (c)). IPMs must investigate matters referred to them by PMCs (section 7D(1)(d)) and can notify the Governor and the PMC of any areas of concern (section 7D(1)(e) and (f)). IPMs must keep records of each prison visit (section 7D(1)(g)).

4.31. Although IPMs must visit prisons in accordance with a rota prepared by the PMC, IPMs are given a power to visit prisons outwith this rota, without prior notice and at such times as they consider necessary (section 7D(2)). IPMs therefore have three distinct types of visits to the prison: firstly, visits arranged with the PMC and agreed with the Governor; secondly, visits arranged with the PMC but without

appointment with the Governor; and thirdly, visits which are not arranged with the PMC and are not by appointment with the Governor.

4.32. Section 7D(3) ensures that the IPMs role in the prison complaints process is not to be taken as the extent of their role in prisoner complaints – IPMs may investigate matters referred to them by a prisoner in accordance with this provision

4.33. The Prison Rules are amended in the Draft Order to provide a significant role for IPMs in the prison complaints process currently provided in the Prison Rules. Section 7B(4) ensures that the Scottish Ministers may make this sort of provision in Prison Rules under the power in section 39 of the 1989 Act.

4.34. IPMs are obliged to comply with any instructions issued by PMCs, attend all training arranged by PMCs and take account of the Chief Inspector's guidance (section 7D(5)). IPMs have powers to visit prisons, speak to persons at the prison and examine prison records (section 7D(6)). IPMs have a duty to report to PMCs as detailed in section 7D(7). The Scottish Ministers have a power to pay the travel and subsistence expenses of IPMs (section 7D(8)).

4.35. The introduction of IPMs is required to support adherence to OPCAT and the NPM by ensuring that there is a system of independent and regular visits to Scottish prisons and also to ensure that the treatment of prisoners or groups of prisoners within those prisons and the conditions in which those in prison are detained are monitored.

Governor's duty to assist with inspection and monitoring

4.36. A duty is placed on the Governor, in the new section 7E to be added to the 1989 Act, to assist with the inspection and monitoring of the prison. The Governor must provide the Chief Inspector, PMCs and IPMs with such assistance as is necessary to enable them to exercise their functions under the Act.

4.37. There had previously been concerns raised by visiting committees that, in their view, Governors could do more to assist them in exercising their functions. Section 7E is designed to address these concerns by creating a statutory obligation on the Governor to assist both in prison inspections and in independent prison monitoring.

4.38. Section 7E is considered to be a provision which would improve the exercise of the public functions of prison inspection and prison monitoring by conferring functions on prison governors (section 14(1) and (3)(a)). There is no requirement that functions conferred under section 14(3)(a) must be conferred on a body listed in Schedule 5. In any event, although prison governors are not listed in Schedule 5, they are employees of the Scottish Ministers and the Scottish Ministers are listed in Schedule 5.

Prison Monitoring Advisory Group

4.39. A body to be known as the "Prison Monitoring Advisory Group" is introduced in section 7F. The Chief Inspector is obliged to establish a Prison Monitoring

Advisory Group comprised of the persons listed in section 7F(2). Under section 7F(3), the Chief Inspector can determine the term of appointment of those persons appointed under section 7F(2)(c) and (d). The Group's functions are specified in section 7F(4) and include the review of independent prison monitoring, the Chief Inspector's guidance and the training of IPMs. The Group may also make recommendations for the improvement of any matter which they must keep under review.

4.40. The Prison Monitoring Advisory Group is considered necessary to ensure that the working methods of independent prison monitoring in Scotland are assessed and reviewed on a regular basis with a view to the identification of good practice and gaps in protection.

Visits by the Sub-committee for the Prevention of Torture (SPT)

4.41. A new section 7G is to be added to the 1989 Act obliging the Scottish Ministers to make arrangements for members of the SPT to visit prisons, access information, monitor the treatment of prisoners and prison conditions and the arrangements for temporary release (section 7G(1)).

4.42. The Scottish Ministers are being given these functions to support their obligations under the OPCAT and the NPM. It is a principle of OPCAT that the NPM should be clearly set out in constitutional or legislative text.

Further amendments to the 1989 Act

4.43. The provisions of the 1989 Act relating to PVCs and LPCVCs are repealed (Article 2(5) and (6)). Some of the functions of PVCs in the 1989 Act are transferred to IPMs. Under amendments to section 15 of the 1989 Act, entries in the prison visitors book made by visiting sheriffs or justices of the peace are to be drawn to the attention of an IPM rather than a member of a PVC (Article 2(7)). Section 19(4) of the 1989 Act is restated to make it more easily understood and to provide that sections 7 to 7G apply to young offenders institutions (Article 2(8)). The amendment to section 34 of the 1989 Act in Article 2(9) will ensure that IPMs will be notified, instead of members of the PVC, of the death of a prisoner. Article 2(10) provides that the regulation making power in the new section 7A(4) of the 1989 Act is subject to the negative procedure while Article 2(11) makes a number of necessary changes to the interpretation section of the 1989 Act.

4.44. These amendments are necessary to remove any existing functions conferred on PVCs and to ensure any continuing functions are transferred to IPMs.

Amendments to the Public Services Reform (Scotland) Act 2010

4.45. Article 3 of the Draft Order removes the entries for visiting committees from Schedules 5 and 6 to the 2010 Act as they will have no remaining functions in light of the amendments made in the Draft Order. In addition, Article 3 adds entries for IPMs, PMCs and the prison monitoring advisory group to Schedule 5 to the 2010 Act. These provisions are necessary, in terms of section 14(6)(a) of the 2010 Act, for the

creation of IPMs, PMCs and the prison monitoring advisory group and for the abolition of visiting committees in accordance with section 14(8) of the 2010 Act.

Amendments to the Prison Rules

4.46. Article 4 of the Draft Order makes a number of amendments to the Prison Rules to remove all reference to PVCs and visiting committees for legalised police cells, to transfer some of the functions of PVCs to IPMs and to confer further functions on IPMs. Article 4(2) adds a definition of IPM to the interpretation provisions in the Prison Rules. Article 4(3) amends rule 120 of the Prison Rules to ensure that prisoners have a right to request to speak to IPMs instead of members of PVCs. Article 4(3) also provides that prisoners may write to IPMs and must be assisted for this purpose.

4.47. Article 4(4) creates a power for IPMs to provide assistance to prisoners in making written complaints to the residential first line manager under rule 120 of the Prison Rules. Article 4(5) makes the same provision for complaints to the internal complaints committee under rule 123 and allows IPMs to assist prisoners at complaints hearings before the committee. Article 4(6) allows the IPM to assist the prisoner with confidential complaints to the Governor under rule 124.

4.48. Article 4(7), (8) and (9) revoke Part 17 of, and Schedules 2 and 3 to, the Prison Rules. Part 17 currently contains the main rules on the constitution and functions of visiting committees for prisons and legalised police cells. Schedule 2 contains a table showing the composition of PVCs and Schedule 3 contains a similar table for LPCVCs.

4.49. These amendments are necessary to remove the rules on the constitution of visiting committees and any existing functions conferred on them. These amendments also establish a greater role for IPMs in the prison complaints process than previously existed for PVC members. They also ensure that prisoners can write to IPMs for any purpose, either to discuss a general concern or raise a specific complaint.

Incidental, transitional and savings provisions

4.50. Article 5 of the Order makes a number of incidental, transitional and savings provisions designed to ensure that ongoing inquiries, investigations and complaints can be concluded by visiting committees within a specified period after the Draft Order comes into force. Notwithstanding the amendments made by Articles 2 and 4 of the Draft Order, visiting committees will continue to exist and will continue to have the powers contained in Part 17 of the Prison Rules for a specified period to enable them to-

- notify the Scottish Ministers of any matters of concern that have not been remedied by the time the Draft Order comes into force (Article 5(2));
- conclude inquiries or inspections under rule 149 and report to the Scottish Ministers (Article 5(3));

- conclude any hearing or investigation into a prisoner complaint which is ongoing at the coming into force of the Draft Order and report in accordance with rule 150(3) (Article 5(4));
- transfer the minute book and other documents held by the visiting committee to the Chief Inspector or, as the case may be, an Independent Custody Visitor (Article 5(5) and (6)); and

finalise their annual report (Article 5(7)).

Consequential modifications

4.51. The Schedule to the Draft Order makes a number of consequential amendments to other pieces of criminal justice legislation in light of the changes being made to the 1989 Act.

Section 27(1)(c)(i): Section 16 preconditions.

Section 16(2)(a): The provision is proportionate to the policy objective

4.52. The policy objective is to establish a system of independent prison monitoring for Scotland which is professional, robust and accountable. The effect of the provisions in the Order is to abolish PVCs and introduce IPMs who will monitor prisons in Scotland and PMCs who will be responsible for the appointment, support and evaluation of IPMs. This system of independent prison monitoring will be placed under the auspices of the Chief Inspector. This is a significant change to the provision of independent monitoring of prisons in Scotland and the necessity of this change can be assessed by comparing the benefits of the new system to the drawbacks of the existing system.

4.53. There are a number of drawbacks in the current system of independent prison monitoring, for example: it is not OPCAT compliant; there is no uniform approach to monitoring across Scotland; there is no standardised reporting mechanism; the performance of PVC members is not regularly evaluated; and there is a lack of accountability. The introduction of a new monitoring regime will address these issues and the monitoring regime we have proposed is no more than is necessary to achieve that aim. The new system will: be OPCAT compliant; ensure a uniform approach to monitoring across Scotland; introduce standardised reporting; ensure that the performance of PMCs and IPMs is regularly evaluated and ensure that the arrangements for monitoring in Scotland are effective, kept up to date and incorporate best practice. The Scottish Ministers therefore consider that the effect of the provisions in the Order is proportionate to the policy objective as the provision of a new system of independent monitoring is required and this necessitates the abolition of PVCs.

Section 16(2)(b): The provision does not remove any necessary protection

4.54. The provision does not remove any necessary protection. We are adapting functions already conferred on PVC members to complement developments that have taken place in relation to the arrangements for handling prisoner complaints in recent years.

4.55. At present there are 2 routes by which a prisoner may complain about their circumstances. There is a formal prisoner complaint system detailed in the Prison Rules. Additionally PVC members currently have a function-also detailed in the Rules- whereby they can investigate prisoner complaints. In terms of the latter, there is no clear definition of what constitutes a complaint and in practice these are a combination of both complaints and requests for assistance.

4.56. In his response to the first consultation, the Scottish Public Services Ombudsman identified a need for further clarity in the draft Order to ensure that roles in complaints handling (for prisoners) “are defined well and work together rather than separately”. He indicated that central to this view “are the guiding principles of the Crerar and Sinclair reports” (which made recommendations for simplification and efficiency in complaints handling) and he advocated that the complaint system in the Prison Rules should be the principal avenue through which prisoners can raise complaints. He added that “allowing SPS staff to address and respond to the issues raised through complaints is the most effective way to achieve resolution and to affect change in conditions, processes and ways of working which will prevent further complaints.”

4.57. In highlighting the importance of prisoners having access to a simple and clear complaints process the SPSO identified that, given the significant issues amongst the prison population in terms of reading and writing ability, it is important that prisoners are supported in this process, particularly in terms of access. He suggested that IPMs could have a valuable role to play in both of these respects, if the role were properly defined.

4.58. Under the proposed arrangements, IPMs are being given powers to assist the prisoner to raise a complaint through the process detailed in the Prison Rules. They will have a power to speak to a prisoner (or a prison officer) in the prison in private. If a prisoner raises an issue of concern with, or makes a complaint to, an IPM, the IPM is able to direct the prisoner to the complaint system (and provide such assistance as may be necessary). Where, the IPM considers that use of the complaints system is not appropriate they are able investigate the matter personally and report back to the prisoner and the Governor/Prison Officers, As part of their monitoring duties IPMs will help to identify any areas of concern in prison, including any concerns with the complaint process, and to raise them with the PMC and Governor. The new section 7D(3) makes it clear that the IPM has a power to investigate any matters referred to the IPM by a prisoner and, accordingly, that the IPM’s role in the prison complaints process does not in any way restrict this power.

Section 16(2)(c): Modified functions consistent with the general objects or purpose of the person concerned

4.59. The general purpose of the Chief Inspector, at present, is to inspect, and report to the Scottish Ministers on, the treatment of prisoners and conditions in prisons. Article 2(3) of the Order modifies the Chief Inspector's functions to provide greater clarity on the role in general, and to place on a statutory basis some functions which the Chief Inspector currently undertakes on a non-statutory basis.

4.60. The Chief Inspector currently has access to prisons, prisoners, prison staff and prison records; Article 2(3) merely places this on a statutory footing. The Chief Inspector may currently inspect the arrangements for temporary release in prisons; Article 2(3) places this on a statutory footing to remove any doubt as to the Chief Inspector's ability to do so. The Chief Inspector's existing core inspection functions are grouped into one subsection for greater clarity as are the Chief Inspector's existing reporting functions. These functions, as modified by Article 2(3), clarify and enhance existing functions in relation to the inspection of prisons and prison conditions and thus are therefore consistent with the general purpose of the Chief Inspector.

4.61. The purpose of the Scottish Ministers' role in the inspection of prisons is limited to the payment of the salary and allowances of the Chief Inspector. The function of paying the Chief Inspector is modified in the amended section 7(7) but only to the extent of empowering the Scottish Ministers to make payments to the Chief Inspector in relation to the general exercise of the Chief Inspector's functions. The modification of the function is to enable the Scottish Ministers to ancillary payments to Chief Inspector to enable the Chief Inspector to exercise his functions under the 1989 Act (eg staff training and general ancillary costs. This is consistent with the Scottish Ministers' role in supporting and enabling the inspection and monitoring of prisons.

Section 16(2)(d): Conferred functions consistent with the general objects or purpose of the person concerned

The Chief Inspector

4.62. A new function is conferred on the Chief Inspector, in new section 7(5) of the 1989 Act, to report to the Scottish Ministers as the Chief Inspector considers appropriate. The Chief Inspector already has a duty to report to Ministers so this new function complements the existing duty by allowing the Chief Inspector the flexibility to issue a report to Ministers even if there is no duty to report at that time. This new function is consistent with the Chief Inspector's existing role in the inspection of prisons and with the Chief Inspector's new role in overseeing independent prison monitoring.

4.63. Article 2(3) of the Order confers new powers on the Chief Inspector in relation to the oversight of independent prison monitoring. The Chief Inspector must publish guidance on independent prison monitoring and evaluate the performance of PMCs. Article 2(4) confers further functions on the Chief Inspector in relation to prison monitoring. The Chief Inspector-

- must be consulted by Scottish Ministers when they appoint PMCs;
- must assign PMCs to prisons;
- may determine the number of IPMs to be appointed by PMCs;
- may refer matters to PMCs which are to be investigated by IPMs;
- may instruct PMCs when to visit prisons;
- may specify the form, manner and content of reports by PMCs;
- may determine the terms and conditions of appointment of IPMs

4.64. Prisons are inspected against a set of inspection standards which focus on safety; decency; humanity; and respect for legal rights. Adding the oversight of independent prison monitoring to the functions of the Chief Inspector is consistent with these overarching objectives. Inspection and monitoring are clearly linked as both aim to ensure adequate conditions for, and treatment of, prisoners. This new structure will ensure that the findings from monitoring activities feed into inspection outcomes and vice versa, therefore joining up all available information in order to provide a full picture of prison conditions to the Scottish Ministers and, via the reporting process, the Scottish Parliament.

4.65. The Chief Inspector will also be given the duty to establish a Prison Monitoring Advisory Group (see the new section 7F of the 1989 Act). The Group is to comprise the Chief Inspector, each of the PMCs, at least 3 IPMs and such other persons as the Chief Inspector considers appropriate. The Group will, amongst other things, review the effectiveness of independent prison monitoring and issue recommendations for the improvement of independent prison monitoring. The Prison Monitoring Advisory Group is consistent with the purpose of the Chief Inspector as it will ensure that monitoring of prisons is carried out effectively thereby contributing to improvements in prison conditions and the treatment of prisoners.

Prison Monitoring Co-ordinators

4.66. PMCs are given the core function of ensuring the effective monitoring of the prisons to which they are assigned. New section 7B of the 1989 Act confers a number of functions upon PMCs to enable them to exercise this core function. PMCs have an administrative role, leaving the operational delivery of independent prison monitoring to IPMs. The functions conferred on PMCs allow for the appointment, assignation, direction, support, training, evaluation and co-ordination of IPMs. The powers conferred on PMCs to visit prisons, speak with persons at the prison in private and examine records allow PMCs to assess whether monitoring is being effectively delivered in any prison. PMCs have a number of reporting duties to the Chief Inspector which allow them to keep the Chief Inspector informed about independent prison monitoring, prison conditions and the treatment of prisoners.

4.67. These functions are consistent with the purpose of PMCs which is stated in new section 7B(1) of the 1989 Act. Prison monitoring is delivered by IPMs and the functions detailed in sections 7B and 7D of the 1989 Act give PMCs the ability to co-ordinate independent prison monitoring so as to ensure each prison is monitored effectively and IPMs are empowered to exercise the powers conferred upon them.

Independent Prison Monitors

4.68. The core function of IPMs is the operational delivery of independent prison monitoring. IPMs are given wide powers to visit prisons (both with and without agreement or appointment with the Governor, and with and without arrangement with the PMC) and wide powers to investigate matters referred to them by PMCs and prisoners. IPMs must monitor prison conditions, the treatment of prisoners and the arrangements for the temporary release of prisoners. IPMs are given a significant role in the prison complaints process contained in the Prison Rules and have a number of reporting duties to PMCs. IPMs are given powers to visit prisons, speak with persons at the prison in private and examine records.

4.69. The purpose of IPMs is to deliver independent prison monitoring under the oversight of the Chief Inspector and the administrative direction of PMCs. IPMs are given a wide array of powers which ensure that independent prison monitoring is carried out independently without any influence from the Scottish Ministers and with minimal interference by the Chief Inspector and PMCs. IPMs may visit prisons at their discretion as well as according to the PMCs rota. IPMs must investigate matters referred to them by PMCs but may also investigate matters at their own discretion including matters referred to them by prisoners or any other person working at the prison. IPMs have reporting duties to PMCs but may also report to PMCs at their discretion on any matters of concern. Accordingly, these functions conferred on IPMs are consistent with their purpose of delivering independent prison monitoring.

Prison Governors

4.70. The Governors of prisons are being given a duty to assist with inspection and monitoring (see the new section 7E of the 1989 Act). The Governor is responsible for the supervision of the prison and the control of prisoners in terms of rule 90 of the Prison Rules. These new functions are consistent with the Governor's role in supervising the prison and controlling prisoners. The Governor is best placed to take steps to ensure that prison inspections can be undertaken effectively by the Chief Inspector and that independent prison monitoring can be undertaken and overseen effectively by the Chief Inspector, PMCs and IPMs.

The Scottish Ministers

4.71. The Scottish Ministers role in prison inspection and independent prison monitoring is limited to the provision of resources to enable both functions to operate effectively and independent of any government influence. The Scottish Ministers are being given a power to provide staff, property or services to the Chief Inspector. This places the current arrangements, whereby Scottish Ministers second staff to the Chief Inspector, on a statutory footing. The Scottish Ministers are also being given a power to make payments to the Chief Inspector in respect of the general exercise of the Chief Inspector's functions. These new functions are consistent with the Scottish Ministers' role in ensuring the Chief Inspector has the resources to adequately inspect prison conditions and the treatment of prisoners.

4.72. The function of appointing PMCs is conferred on the Scottish Ministers. This function is subject to a duty to consult the Chief Inspector and may be restricted further by Regulations if that is considered necessary. As the Scottish Ministers are given the function of paying the salary and allowances of PMCs, it is considered appropriate that the function of appointing PMCs also lies with the Scottish Ministers. The Scottish Ministers are also given the function of paying the travel and subsistence expenses of IPMs. These functions are consistent with the Scottish Ministers limited role in independent prison monitoring – the Scottish Ministers must make available the resources to ensure independent prison monitoring can be undertaken effectively but the Scottish Ministers have no power to influence the manner in which independent prison monitoring is delivered.

4.73. The Scottish Ministers are being given the function of making arrangements for SPT visits to prisons (see the new section 7G of the 1989 Act). The Scottish Ministers are already responsible for the general superintendence of prisons in Scotland under section 3(1) of the 1989 Act, read alongside section 53 of the

Scotland Act 1998. The new function in section 7G is therefore consistent with the Scottish Ministers' existing role in the overall control of prisons in Scotland.

Section 16(2)(e): Conferred functions consistent with the general objects or purpose of a person whose functions have been abolished

4.74. The powers and duties conferred on IPMs by the new sections 7C and 7D of the 1989 Act (to be added by Article 2(4) of the Order) and by the general amendments to the 1989 Act and the Prison Rules replicate and extend the general objects or purpose of PVCs. The core functions of PVCs under the 1989 Act are to visit prisons, hear complaints and report to the Scottish Ministers; further functions of promoting the efficiency of the prison and inquiring into the state of the prison are conferred in the Prison Rules.

4.75. The functions conferred on IPMs are set out in more detail than is currently the case for PVCs. The main operational functions of IPMs - to visit and monitor prisons and report to PMCs and prison Governors - reflect the existing functions of PVCs. The functions and operation of PVCs have remained generally unchanged for many years and all of the functions are being replicated for IPMs including the investigation of matters referred to the IPM by the prisoner as explained further in paragraph 4.54-4.58 above. This new system will provide a modern, accountable and professional independent monitoring system building on the current functions of PVCs. Accordingly, the functions of independent prison monitoring conferred on IPMs in the Order are consistent with the general purpose of PVCs, who are in turn being abolished by the Order.

4.76. Similarly, the role given to PMCs, albeit with administrative functions which were not previously exercised by PVCs, is consistent with the overall purpose of PVCs which is to monitor prison conditions and the treatment of prisoners. The role of PMCs is intended to support IPMs to enable them to better exercise their functions and to ensure a uniform standard of independent prison monitoring. The overall intention behind the creation of the role of PMCs is to improve the effectiveness of independent prison monitoring in Scotland and this is consistent with the purpose of PVCs.

4.77. The creation of a Prison Monitoring Advisory Group and the placing of an obligation on Governors to assist with independent prison monitoring is also intended to improve the standard of independent prison monitoring in Scotland which is consistent with the purpose of PVCs. The creation of an obligation on Ministers to make arrangements for SPT visits is intended to ensure open access to the prison for the SPT which in turn allows a further tier of independent prison monitoring albeit on a less frequent basis. This will enhance the effectiveness of independent prison monitoring which is consistent with the purpose of PVCs.

Section 16(10): Restatement of an enactment

4.78. The inspection duties in section 7(2)(a) and (b) of the 1989 Act are restated in the new section 7(2)(a) and (b) as inserted by the Order. The reporting duties in section 7(2)(a) and (b) and (3) of the 1989 Act are restated in section 7(3)(a). Section 7(4) of the 1989 Act is partially restated in the new section 7(2)(d) as

inserted by the Order. Section 7(4) currently allows the Scottish Ministers to refer matters to the Chief Inspector and have the Inspector report on them. The new section 7(2)(d) allows Ministers to refer matters to the Chief Inspector and have the Inspector investigate them, the reporting duty now being contained in section 7(3)(b).

4.79. Section 7(5) of the 1989 Act is partially restated by the new section 7(3)(c)(i), (4) and (5) as inserted by the Order. Section 7(5) currently obliges the Chief Inspector to submit an annual report to the Scottish Ministers, in such form as Ministers direct, and obliges Ministers to lay the report before Parliament. The new section 7(3)(c)(i) obliges the Chief Inspector to report annually to Scottish Ministers in relation to the conditions in prisons and the treatment of prisoners. The new section 7(4) allows the Scottish Ministers to direct the form and timing of the report. The new section 7(5)(a) provides for the report to be laid before Parliament but places this obligation on the Chief Inspector.

4.80. The new section 7(2)(a) and (b) as inserted by the Order are expressed as part of a wider subsection which sets out the functions of the Chief Inspector. This is part of the restructuring of section 7 to distinguish the functions of the Chief Inspector, the reporting duties placed on the Chief Inspector and the powers which allow the Chief Inspector to perform the functions.

4.81. The new section 7(2)(d) as inserted by the Order replicates the ability of Ministers to refer matters to the Chief Inspector but in the context of the Chief Inspector's function of investigating those matters. This is placed alongside the Chief Inspector's inspection functions as there is a clear correlation between these functions.

4.82. The new section 7(3) replicates the duty on the Chief Inspector to report following an inspection in the current section 7(2)(a) and (b) but combines it with the duty to report on individual investigations (currently section 7(4)) and prepare an annual report (currently section 7(5)). The purpose of this is to have all of the reporting duties together in one subsection to clarify the Inspector's duties to report to Ministers.

4.83. The restatement of these provisions is intended to make section 7 more accessible and easier to understand by giving it a clearer structure and grouping similar functions and duties in subsections. By grouping the restated provisions alongside the further powers being conferred on the Chief Inspector, the restated provisions are given greater context and purpose.

Section 27(1)(c)(ii): Improving the exercise of public functions

4.84. The provisions will improve the exercise of public functions having regard to efficiency, effectiveness and economy.

Efficiency

4.85. The current system of independent prison monitoring is not as efficient as it could be. There is no national approach to monitoring and the service is inconsistent throughout the country. The current structure does not allow for assessing the

performance of PVCs or individual PVC members. Due to the lack of formal structure and accountability, it is not possible to ensure that all aspects of prisons are monitored on a regular basis.

4.86. Under the new system there will be a consistent approach to independent prison monitoring across Scotland and a centralisation of support, guidance and management through the Chief Inspector and PMCs. IPMs will be recruited against a set of skills and competencies and their performance will be regularly evaluated by PMCs. This formal structure will ensure that all aspects of prison conditions and prison life can be monitored regularly. The new system will raise the profile of independent prison monitoring amongst prisoners and ensure increased engagement with them. There will also be improved standardised reporting with the imposition of duties on IPMs to report to the PMC, duties on the PMCs to report to the Chief Inspector and on the Chief Inspector to report to the Scottish Ministers and the Scottish Parliament.

4.87. Situating the independent prison monitoring service under another public body would be inefficient and uneconomical as an entire new system would require to be designed. In this case, whilst the Scottish Government recognises the distinction between inspection and monitoring, bringing these two functions together under the auspices of the Chief Inspector allows for integration into an existing system. This structure allows for an efficient system of information flow between the Chief Inspector on the one hand and PMCs and IPMs on the other, without the need to cross organisational boundaries. The integration of guidance and standards in relation to monitoring and inspection also provides for an efficient use of resources. The Scottish Ministers therefore consider that the provisions in the Order will make the exercise of the function of independent prison monitoring more efficient.

Effectiveness

4.88. The current system is not as effective as it could be. Article 17 of OPCAT requires that each State Party shall maintain, designate or establish one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Under Article 18, State Parties must guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.

4.89. The current system does not comply with OPCAT due to the lack of separation of functions between the Scottish Ministers and PVCs. The new independent prison monitoring system will address this by situating independent prison monitoring under the Chief Inspector who is appointed by Royal Warrant and therefore operates independently of the Scottish Prison Service and the Scottish Ministers in general. Compliance with OPCAT will allow the Scottish system of independent monitoring to form part of the UK National Preventive Mechanism which currently is not the case for PVCs. The Chief Inspector is a member of the UK National Preventive Mechanism and is best placed to support and oversee independent prison monitoring and to bring to light any instance where standards fall short of what would be expected in a modern prison service.

4.90. The new system of independent prison monitoring will be more effective than the monitoring provided by PVCs as it will ensure: OPCAT compliance; a higher profile amongst prisoners; increased accountability; standardised reporting; and evaluation and appraisal of IPMs. The link to inspection will also be a considerable benefit of the new system as, when necessary, the Chief Inspector can ensure that identified problem areas within specific prisons are regularly monitored. The effectiveness of the new system will also be evidenced through the ability to provide a fuller picture to Scottish Ministers through the reporting by IPMs to PMCs, by PMCs to the Chief Inspector and onward reporting by the Chief Inspector to the Scottish Ministers. The Scottish Parliament will also be made more aware of prison conditions and the treatment of prisoners via the Chief Inspector's duty to lay a number of reports before Parliament. The Scottish Ministers therefore consider that the provisions in the Order will make the exercise of the function of independent prison monitoring more effective.

Economy

4.91. Although the new system is more expensive, it will better safeguard the rights of prisoners thus providing better value for money than the existing regime of independent prison monitoring. The new regime will cost more but it will produce better results and, accordingly, will prove more economical overall. The new system of independent prison monitoring will ensure that areas of concern within prisons are identified, and can be addressed, at an earlier stage, thereby protecting the rights of prisoners and reducing the likelihood of litigation. The Scottish Ministers therefore consider that the provisions in the Order will make the exercise of the function of independent prison monitoring more economical.

Section 27(1)(c)(iii): Transfer of functions to the Scottish Ministers

4.92. The Chief Inspector is independent of Scottish Ministers but is an office holder in the Scottish Administration. The functions of issuing guidance on independent prison monitoring, evaluating PMCs and establishing the Prison Monitoring Advisory Group together with a role in the appointment of PMCs and IPMs are all being conferred on the Chief Inspector.

4.93. The following functions are placed on the Scottish Ministers under the Order—

- to refer matters to the Chief Inspector for investigation;
- to direct the form and timing of certain reports by the Chief Inspector;
- to pay the salary and allowances of the Chief Inspector;
- to provide the Chief Inspector with staff, property or services;
- to appoint PMCs in consultation with the Chief Inspector;
- to prescribe, in Regulations, procedures for the appointment of PMCs;
- to pay the salary and allowances of PMCs;
- to pay the travel and subsistence expenses of IPMs.

These functions are to be exercised principally by the Scottish Government's Justice Directorate and Directorate for People.

4.94. The Scottish Ministers are also being given the function of making arrangements for SPT visits to prisons. The intention is that this function will be exercised by the Scottish Prison Service.

Section 27(1)(e): Functions of legislating

4.95. The Scottish Ministers are being given a function of legislating in the new section 7A(4) to be added to the 1989 Act by Article 2(3) of the Draft Order. Under this provision, the Scottish Ministers may prescribe in regulations the procedures which must be complied with in appointing PMCs. Section 7A(5) provides that regulations made under subsection (4) may include requirements for consultation prior to appointments being made, the terms and conditions of appointments, the periods of appointment and the termination of appointments.

4.96. Article 18(1) of OPCAT requires that the NPMs for the prevention of torture must be functionally independent of government and their personnel must be independent of government. The powers and duties to be given to PMCs in the new sections 7A and 7B of the 1989 Act ensure the functional independence of PMCs from the Scottish Ministers. The Scottish Ministers have no power to direct PMCs in any of the provisions added to the 1989 Act by the draft Order.

4.97. In addition to this, the procedures for appointing PMCs must ensure that the persons appointed to that role are sufficiently independent of the Scottish Ministers. This regulation making power is designed to enable Ministers to create formal appointment processes for PMCs should it be considered that the appointment processes being used are falling short of this requirement. The regulation making power could be used to set up formal procedures for consultation with wider stakeholders, beyond the Chief Inspector, in the appointment of PMCs or it could be used to establish an independent assessment panel should that be considered necessary.

4.98. As this regulation making power is designed to safeguard against any potential breach of OPCAT in the appointment procedures adopted for PMCs it is considered that some Parliamentary scrutiny of the proposed appointment procedures is necessary. As these regulations will simply prescribe procedure it is considered that the negative procedure would be sufficient.

CHAPTER 5: THE FIRST CONSULTATION

Section 27(1)(f)(i): Details of the first consultation

5.1. The Scottish Government opened a consultation (published on its website) on 4 October 2013 to provide stakeholders with the opportunity to comment on the proposed draft Order in accordance with section 26(1) of the 2010 Act. No specific questions were posed with respondents being invited to comment on any aspect of the draft Order or Explanatory Document. The consultation closed on 31 January 2014 with a total of 36 written submissions received from the following respondents:

- Prison Visiting Committees (14)
- Local Authorities (8)
- Criminal Justice Organisations (6)

Inspection, Monitoring or Complaints Organisations (3)
Human Rights Organisations (2)
Individuals (2)
Professional or Representative Organisations (1)

5.2. The submissions to the consultation and the analysis of these submissions were subsequently published on the Scottish Government's website and can be accessed using the following links:

<http://www.scotland.gov.uk/Publications/2014/02/4705> (Submissions)

<http://www.scotland.gov.uk/Publications/2014/04/8634> (Analysis of Submissions)

Full copies of the submissions received to the first consultation can be found in **Annex A**. A copy of the analysis report can be found at **Annex B**.

5.3. The Justice Committee of the Scottish Parliament considered its approach to the draft Order at its meeting on 8 October 2013. It agreed to issue a call for written views on the draft Order and also to take oral evidence. The Committee received 29 responses to its call for evidence and took oral evidence from a number of stakeholders on 20 November 2013. A copy of the report of the Justice Committee can be found at **Annex C** or by accessing the following link:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/71803.aspx>

5.4. The Scottish Government's Consultation Report was published on 19 September 2014 and can also be found on the Scottish Government's Publications web pages at the following link:

<http://www.scotland.gov.uk/Publications/2014/09/3123>

A copy of the Consultation Report can also be found in **Annex D**.

5.5. The main issues raised through the consultation process are described in further detail in paragraphs 5.6 to 5.21.

Section 27(1)(f)(ii): Representations received as a result of the first consultation

5.6. The main issues raised through the first consultation process were:

The Roles of Monitors

5.7. The need for two types of monitor was questioned. Views were expressed that the proposed structure would increase the complexity and bureaucracy of the service provided and that having two separate roles may impact on service provided.

Titles

5.8. There were reservations over the proposed titles for the 2 types of monitor (paid monitor and lay monitor) and concern that this would lead to a perception that the former were professionals and the latter amateurs.

Reporting and communication arrangements

5.9. Concern was expressed around the access that monitors would have to Scottish Ministers under the proposed arrangements and over the potential for

monitoring to feature only as a small element of the Chief Inspector's annual inspection report.

Recruitment and appointment process

5.10. More information was sought in relation to the recruitment process with a request for transparency including details of how long monitors would be appointed for.

Independence

5.11. There was some concern around independence both in terms of the proposed structure and independence of monitors and the monitoring process. There was a view that the requirement for IPMs to comply with instructions of PMCs would not be OPCAT compliant; that the latter would be viewed as civil servants; and that the independence of both types of monitors would be compromised by having to take instructions from the Chief Inspector or by virtue of being paid.

Training and support

5.12. It was suggested that there was a lack of information about the training and administrative support that would be available to the monitors in the new system.

Prisoner complaints

5.13. Concern was expressed over the lack of clarity around the role of monitors in the complaints process.

Assigning of monitors to prisons

5.14. Some respondents considered that there was potential for a loss of local knowledge amongst IPMs in the new system given the reference in the draft Order to both PMCs and IPMs being assigned by the Chief Inspector to "prisons within a particular area of Scotland; particular prisons within Scotland or all prisons in Scotland".

Terminology and detail

5.15. There were representations to the effect that there was a lack of detail surrounding the role of Lay/Independent Prison Monitors. Some respondents considered that the wording of the draft Order and associated documentation was confusing, with the word 'inspected' being used in place of 'monitored' on occasion.

Changes to the system

5.16. It was suggested that as Guidance on the new system of independent prison monitoring will be created by the Chief Inspector, there was potential for an amendment to be made to the proposed new system without ratification by Parliament or a public consultation. One respondent took the view that the independence of the new structure would be undermined if the executive government had the legal authority to alter its mandate, composition and powers at will.

Prison Monitoring Advisory Group

5.17. Some respondents highlighted that the Prison Monitoring Advisory Group, which had been referenced in the Cabinet Secretary's Response to the Justice Committee, had been omitted from the draft Order.

Provision of facilities

5.18. Some respondents highlighted that the Order did not contain a duty for the prison Governor to provide a confidential setting for members to hear and deal with requests, which they felt would be necessary for the execution of the Monitors' duties.

Rights, protection, scrutiny and accountability

5.19. Some respondents considered that there was a lack of reference to OPCAT or other Human Rights standards within the draft Order, which they considered necessary to establish an effective system to prevent human rights violations in prison.

Transition

5.20. A number of respondents highlighted that there would need to be a transition period between the current service and the proposed new system, asserting that the way this was handled was as important as the establishment of the new system.

Progression of issues/matters not remedied

5.21. Concern was expressed around the lack of direct access by Monitors to Scottish Ministers whereby if a matter of concern which had been brought to the attention of the prison Governor had not been remedied within a reasonable period, Scottish Ministers could be notified.

Section 27(1)(f)(iii): Changes made to the proposed draft Order as a result of representations received

Changes to the amendments to the 1989 Act

Title of the draft Order

5.22. The title of the draft Order has been changed to the Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014.

Section 6A (purpose of inspection and monitoring of prisons)

5.23. A new section 6A has been inserted to specify that the purpose of independent prison monitoring is to meet the objectives of OPCAT, that is the objective of establishing a system of regular visits undertaken by international and national bodies to places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Section 7 (appointment and functions of Her Majesty's Chief Inspector of Prisons for Scotland):

5.24. Section 7(2)(f) has been inserted to provide that the Chief Inspector has a function to prepare and publish guidance on the exercise of the functions of IPMs. Section 7(2)(g) has been inserted to provide that the Chief Inspector has a function to evaluate the performance of each PMC. Section 7(2)(h) has been added to include any other functions that may be conferred on the Chief Inspector elsewhere in the 1989 Act or in any other enactment.

5.25. Section 7(3)(c) has been amended to specify that the Chief Inspector will report annually, in such form as the Scottish Ministers may direct, on the exercise of the functions of prisons by IPMs.

5.26. Section 7(6) has been inserted to provide that the Chief Inspector may report to Scottish Ministers on any matter relating to prisons, prisoners or independent prison monitoring which the Chief Inspector considers appropriate.

5.27. Section 7(7) [previously section 7(5)] has been amended to the effect that the Chief Inspector may access any part of a prison, may speak in private with persons at the prison and this now expressly includes PMCs and IPMs. The power to inspect prison records is changed to a power to examine prison records to avoid confusion with the Chief Inspector's powers of inspection.

5.28. The format of what is now section 7(8) has been amended to provide greater clarity on the Scottish Ministers duty to pay the salary and allowances of, and other sums to, the Chief Inspector. Section 7(9) has been added so that Scottish Ministers may provide staff, services or property to the Chief Inspector to assist the Chief Inspector in the exercise of the Chief Inspector's functions.

5.29. The changes to the amendments to section 7 are intended to provide greater clarity to the Chief Inspector's role in the oversight of independent prison monitoring and to enable the Scottish Ministers to ensure the Chief Inspector is adequately resourced to exercise the functions conferred on that role.

Section 7A (appointment of Prison Monitoring Co-ordinators)

5.30. The title of "Prison Monitors" is changed to "Prison Monitoring Co-ordinators";

5.31. Section 7A in the previous proposed draft Order has been split into two separate sections dealing firstly with the appointment of PMCs and secondly the functions of PMCs. Section 7A(1) to (3) now provides for PMCs to be appointed by the Scottish Ministers in consultation with the Chief Inspector. No fewer than three PMCs must be appointed at any given time and the Scottish Ministers must consult the Chief Inspector if more than three are to be appointed.

5.32. Section 7A(4) has been added to provide that the Scottish Ministers may prescribe in regulations the procedures which must be complied with in appointing PMCs under subsection (2) and further detail as to what may be prescribed is given in subsection (5). Section 7A(6) now provides that PMCs must be assigned to prisons by the Chief Inspector ensuring that every prison has an assigned PMC. Subsection (7) replicates the provisions of what was section 7A(3) in the previous draft proposed Order.

5.33. The provisions of the new section 7A are intended to provide greater clarity on the appointment and of PMCs and their assignation to prisons by the Chief Inspector.

Section 7B: Functions of Prison Monitoring Co-ordinators

5.34. The provisions in what was previously section 7A which related to the functions of prison monitors are now contained in section 7B of the Draft Order and now form the functions of PMCs.

5.35. Section 7B(1) provides an over-arching purpose for PMCs – they must ensure the effective monitoring of each prison to which they are assigned.

5.36. Section 7B(2) states the duties of PMCs in relation to their core function of ensuring the effective monitoring of prisons. PMCs must appoint IPMs and assign them to a prison to which the PMC is assigned. PMCs must arrange for IPMs to visit prisons, arrange for specific matters to be investigated by IPMs, provide support and arrange training for IPMs and arrange a twice-yearly meeting between the IPMs assigned to the prison. PMCs must evaluate the performance of IPMs. The duties given to PMCs are now markedly different to those that were to be conferred on prison monitors. PMCs are to be given a more administrative role in co-ordinating the delivery of independent prison monitoring.

5.37. The duties on prison monitors to comply with instructions, and take account of guidance, from the Chief Inspector are replicated for PMCs as are the powers to visit prison, speak to people at the prison and examine prison records. The reporting duties which were to be imposed on prison monitors have been clarified and extended for PMCs.

5.38. The previous draft proposed Order made provision for the payment of the salary and allowances of prison monitors by the Chief Inspector. This has been changed in the Draft Order so that the salary and allowances of PMCs are to be paid by the Scottish Ministers.

5.39. Significant changes have been made to what was previously the role of prison monitor. Previously, prison monitors were given the core duty of monitoring prisons with lay monitors to assist prison monitors in complying with that duty. PMCs are now given a more administrative role, co-ordinating and directing the operational delivery of independent prison monitoring by IPMs.

Section 7C (Appointment of Independent Prison Monitors)

5.40. The title of “Lay Monitors” is changed to “Independent Prison Monitors”.

5.41. Section 7C now makes some provision in relation to the appointment of IPMs following the format of the provisions for PMCs. The Chief Inspector is given power to determine the terms and conditions on which IPMs are appointed and IPMs are to be appointed for a specified period and may not be reappointed more than twice following the expiry of the period of appointment. Section 7C has been added to provide further detail on the appointment of IPMs reflecting the approach taken in section 7A.

Section 7D (Functions of independent prison monitors)

5.42. The provisions in what was previously section 7B which related to the functions of lay monitors are now contained in section 7D of the Draft Order and now

form the functions of IPMs. The previous proposed draft Order placed the main functions of monitoring on prison monitors and lay monitors were obliged to assist prison monitors in the exercise of those functions. The duties given to IPMs are now markedly different to those that were to be conferred on lay monitors. IPMs are to be given a more operational role with responsibility for the day to day monitoring of prisons.

5.43. Section 7D(1) contains the main duties which were previously placed on prison monitors. IPMs are now obliged to visit the prison according to the rota agreed with the PMC and the Governor and monitor both prison conditions and the treatment of prisoners. IPMs must investigate matters referred to them by the PMC and can notify the Governor of any matters of concern. IPMs must inform the Governor and the PMC if any matter notified to the Governor has not been remedied to the satisfaction of the IPM. IPMs must also keep records of each visit to the prison.

5.44. Section 7D(2) has been added which provides that notwithstanding the duty to visit the prison according to the pre-agreed rota, IPMs may visit the prison at their discretion without prior notice.

5.45. Section 7D(4) clarifies the existing rule-making power in section 39 of the 1989 Act to ensure that the Prison Rules may make provision for IPMs to assist the prisoner in any complaints process which may be provided for in the Prison Rules.

5.46. The duties on lay monitors to comply with the instructions of prison monitors and take account of guidance from the Chief Inspector are replicated for IPMs (instructions now being issued by PMCs). IPMs now have the added duty to attend training arranged by the PMC. The powers to visit prison, speak to people at the prison and examine prison records which were previously conferred on lay monitors have been clarified and replicated for IPMs. The reporting duties which were to be imposed on lay monitors have been clarified and extended for IPMs.

5.47. The previous draft proposed Order made provision for the payment of the travel and subsistence expenses of lay monitors by the Chief Inspector as considered appropriate. This has been changed in the Draft Order so that the travel and subsistence expenses of IPMs may be paid by the Scottish Ministers as considered appropriate.

5.48. Section 7D now contains many of the independent prison monitoring duties which were conferred on prison monitors under the previous proposed draft Order. These changes are designed to give IPMs greater autonomy in the delivery of independent prison monitoring.

Section 7E (Duty of the Governor to assist with independent prison monitoring)

5.49. A new section 7E has been added into the 1989 Act to place an obligation on the Governor to assist with prison inspections and monitoring. The Governor must ensure that the Chief Inspector, IPMs and PMCs are provided with such assistance as is necessary to allow them to exercise their functions under the 1989 Act. This provision is intended to deal with concerns that there are a number of powers for the

Chief Inspector, PMCs and IPMs which rely on the co-operation of prison Governors but no obligation on Governors to provide such assistance.

Section 7F (Prison Monitoring Advisory Group)

5.50. A new section 7F is inserted into the 1989 Act to provide for the establishment of a Prison Monitoring Advisory Group by the Chief Inspector. The Advisory Group must comprise (a) the Chief Inspector, (b) each of the PMCs (c) at least three IPMs, and (d) such other persons as the Chief Inspector considers appropriate. Section 7F(3) makes provision for the term of appointment of Advisory Group members. Section 7F(4) makes provision for the functions of the Advisory Group including keeping the effectiveness of independent prison monitoring under review and making recommendations for the improvement of independent prison monitoring.

5.51. Section 7F is a new provision designed to give a number of stakeholders a chance to contribute to the effective monitoring of prisons by keeping existing arrangements under review, contributing to the guidance to be issued by the Chief Inspector and make recommendations for improvements in independent prison monitoring.

Section 7G (SPT visits)

5.52. A new section 7G is inserted into the 1989 Act in similar terms to section 95 of the Police and Fire Reform (Scotland) Act 2012. This section obliges the Scottish Ministers to make arrangements to ensure that the Subcommittee for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment may visit prisons, access information about the prison and monitor the treatment of prisoners. Section 7G(2) makes further provision about the nature of the arrangements. Section 7G(3) provides that the Scottish Ministers must keep the arrangements under review.

Other consequential changes

5.53. The changes to the titles of prison monitor and lay monitor have necessitated a number of consequential changes to the amendments to the 1989 Act. The amendment of section 19 of the 1989 Act by Article 2(8) has been changed to provide greater clarity and to ensure that the new provisions in sections 7 to 7G all apply to young offenders institutions. The changes to section 42 of 1989 Act (interpretation) have been amended to provide definitions of IPM, PMC, OPCAT and SPT.

Changes to the amendments to the 2010 Act

5.54. The amendments to Schedule 5 of the 2010 Act have been updated to take account of the new terminology used in Article 2.

Changes to the amendments to the Prison Rules

5.55. Article 4 of the Draft Order replicates many of the provisions in Article 4 of the previous proposed draft Order but also makes a number of significant changes. Part 17 of, and Schedules 2 and 3 to, the Prison Rules are still being revoked but IPMs are being given an enhanced role in the prison complaints process provided in Part 12 of the Prison Rules. Rule 120 is being amended so as to enable prisoners to make a request to speak to an IPM and Governors must provide assistance where a

prisoner wishes to write to an IPM. Rules 122 to 124 are being amended to enable an IPM to provide, following a request from a prisoner, such assistance as they consider appropriate to the prisoner in the complaints processes detailed in those rules. In addition, IPMs are being given a role in assisting the prisoner in a complaints hearing before the Internal Complaints Committee in rule 123. These changes are designed to clarify and extend the role of IPMs in the prison complaints process.

Changes to the savings and transitional provisions

5.56. The Draft Order now includes some savings and transitional provisions to ensure a smooth transition from the existing system to the new system. The coming into force of the Draft Order would otherwise end the powers and duties of PVCs but the provisions in Article 5 of the Draft Order will ensure that certain powers and duties of the PVCs will continue for a specified period in order to enable them to:

- notify the Scottish Ministers of any matters of concern that have not been remedied by the time the Draft Order comes into force (Article 5(3));
- conclude inquiries or inspections under rule 149 and report to the Scottish Ministers (Article 5(4));
- conclude any hearing or investigation into a prisoner complaint which is ongoing at the coming into force of the Draft Order and report in accordance with rule 150(3) (Article 5(5));
- transfer the minute book and other documents held by the visiting committee to the Chief Inspector or, as the case may be, an Independent Custody Visitor (Article 5(6) and (7)); and
- finalise their annual report (Article 5(8)).

5.57. Article 5 also provides that all visiting committees will cease to exist once the specified period comes to an end.

Changes to the consequential amendments in the Schedule

5.58. A number of minor stylistic changes have been made to the consequential amendments in the Schedule to the Draft Order.

CHAPTER 6: THE SECOND CONSULTATION

Section 27(1)(f)(i): Details of the second consultation

6.1. The Scottish Government opened a consultation (published on its website) on 19 September 2014 to provide stakeholders with the opportunity to comment on the changes made to the proposed draft Order in light of the first consultation in accordance with section 26(4) of the 2010 Act. The consultation closed on 13 October 2014 with a total of 30 written submissions received from the following respondents:

- Prison Visiting Committees (12)
- Local Authorities (4)
- Individuals (4)
- Criminal Justice Organisations (3)
- Inspection, Monitoring or Complaints Organisations (3)

Professional or Representative Organisations (2)
Health and Well-being Organisations (1)
Human Rights Organisations (1)

6.2. The following questions were posed in the consultation paper, with the option to select either 'Yes' or 'No' along with the opportunity for respondents to provide the reasons for their choice :

- Q1 "Do you support the change of the role titles from 'Lay Monitor' to 'Independent Prison Monitor' (IPM) and from 'Prison Monitor' to 'Prison Monitoring Co-ordinator' (PMC)?"
- Q2 "Does the revised draft Order provide greater detail on the functions to be carried out by the IPM?"
- Q3 "Do you support the clarifications that have been made to the role of the PMC, which seek to explain their administrative role, in relation to prison monitoring?"
- Q4 "Do you support the inclusion of provisions in the draft Order whereby the PMC is required to provide support, and arrange for the training, of IPMs?"
- Q5 "Do you welcome the inclusion of a provision that places a duty on the prison governor to ensure that the Chief Inspector, IPMs and PMCs are provided with such assistance as is necessary to allow them to exercise their statutory functions?"
- Q6 "The draft Order contains provisions for IPMs to support prisoners in raising a complaint through the existing complaints process while retaining a discretion for them to resolve personally any particular matter which it is assessed cannot be dealt with through this route. Do you consider that this provides the basis for a clearer and more consistent complaint-handling process for prisoners?"
- Q7 "Do you support the inclusion of provisions in relation to the establishment and composition of a Prison Monitoring Advisory Group in the draft Order?"
- Q8 "Do you support the inclusion of a provision in the revised draft Order explaining that the purpose of inspection and monitoring is in pursuance of the objective of the UN Optional Protocol to the Convention Against Torture (OPCAT), and a section which outlines Scottish Ministers' duties in relation to the Subcommittee on the Prevention of Torture (SPT) visits?"
- Q9 "Do you support the inclusion in the Order of a transitional period of 3 months to allow any work undertaken by the Prison Visiting Committees, at the time the new system comes into force, to be completed?"
- Q10 "Do you have any further comments on the draft Order or Explanatory Document?"

6.3. It should be noted that, whilst 30 submissions were considered by the Scottish Government and published on its website, only 29 of the submissions were included in the analysis as the remaining submission was received too late to be included in the report or its findings.

6.4. The submissions to the consultation and the analysis of these submissions were subsequently published on the Scottish Government's website and both can be accessed on the 'Publications' web pages using the following link:

<http://www.scotland.gov.uk/Publications/2014/11>

Full copies of all submissions to the second consultation can also be found in **Annex E** and a copy of the analysis report is included at **Annex F**.

6.5. Two further submissions were received a period of 3 weeks after the closing of the consultation and were therefore not included in the analysis or in the considerations of the Scottish Government. Full copies of these submissions are included in **Annex G**.

6.6. The Scottish Government's Response to the second consultation will be published (including on the Government's Publication web pages) in due course.

Section 27(1)(f)(ii): Representations received as a result of the second consultation

6.7. The main issues raised through the second consultation process were:

Independence

6.8. There was a high level of support for the change of role titles with the most common theme for additional comments being the identification of positive aspects or benefits of the change, suggesting that they were an improvement on the previous proposals and reflective of the roles. It was also argued that the change helped in clarifying the distinction between the roles of IPM and PMC.

6.9. Some respondents questioned how "independent" IPMs would be and raised a concern that they would be significantly less independent than VC members are now. There was also a view that the revised role titles were 'misleading' given that IPMs would receive direction from PMCs, thus compromising their independence. Views were also expressed that the recruitment of PMCs by HMICPS would compromise the independence of IPMs, and that there was a lack of separation of monitoring from inspection overall. Concern was also raised over the role of the Governor in agreeing the IPM rota with PMCs and the inability of IPMs to report concerns directly to the governor or Scottish Ministers. The appointment and management of IPMs by the PMCs, and the need to comply with instructions, was also raised by respondents.

Role of IPM

6.10. Some respondents believed that the draft Order provided greater detail on the role of the IPM commenting that the level of detail was helpful in considering the proposals and that the previous consultation had clearly guided the revised draft. Issues identified as being clearer, or welcomed, included: how the functions fit with the responsibilities of the PMC, the assignment of an IPM to a specific prison, the primary role of IPM as being monitoring, the IPM's role in the complaints process, recognition of the need for rotas alongside unannounced visits, the requirement for formal training, and recognition of evaluation.

6.11. Some respondents felt that there remained a lack of detail in relation to the role of the IPMs, particularly when compared to the existing legislation relating to VCs. Respondents also raised concerns about the omission of the number and composition of IPMs required, the number of IPMs per prison, the frequency and regularity of visits to each prison and the appointment criteria. Concern was also

expressed regarding the omission of a provision for IPMs to meet regularly as a group to share information and discuss issues with the Governor. Other perceived omissions included the requirement to produce an Annual Report on each prison and provision to create a national forum.

Role of PMC

6.12. There were comments received which were in overall agreement or expressing satisfaction with the clarifications made to the role of the PMC. It was suggested that the definition and role purpose was clearer, including the addition of responsibility for rotas, recruitment and training. Some respondents felt that the clarification would help remove confusion about who is responsible for the day to day work of monitoring. It was also suggested that the responsibility to provide an annual report for each prison to which the PMC is assigned would provide good performance information on prisons.

6.13. Some respondents raised concerns in relation to the nature of the PMC role and its link to HMCIPS. There was a view that the role of PMC contained only a small administrative element and was more directive and managerial in nature. Some respondents also felt that the PMC would act in accordance with the wishes of the Inspectorate and effectively be agents of HMCIPS and managers of the IPMs. There was concern that this would lead to the PMC ensuring IPMs followed up on inspection findings and that the distinction between inspection and monitoring would be blurred so that monitoring became ongoing inspection. One further concern involved the perception that PMCs would be responsible for supporting individual IPMs rather than coherent teams.

Support and Training

6.14. Almost all of the respondents who made additional comments were positive in relation to the inclusion of provisions for support and training in the Order, with many respondents commenting on the importance of both support and training, or the need for it.

6.15. Some concerns were raised by respondents that the support and training provided to IPMs would lie at the discretion of the PMCs and that there was no guarantee that the training would cover all of the important topics, leading to inconsistencies across the country. Some respondents also raised concerns that there was a requirement for IPMs to attend *all* training arranged by the PMC which was viewed as 'overly prescriptive' and could lead to an IPM being in breach of the Order if they could not attend a training session on a particular date. Concern was also raised about the demands the requirements would place on a small number of staff with a broad remit.

Provision of assistance by Governors

6.16. Most respondents made positive comments or identified benefits of the inclusion of a duty on the Governor to ensure the provision of assistance. Some respondents felt that this would ensure that Governors would recognise their part in the process as well as the authority of IPMs and PMCs, and would ensure that Governors recognise the alignment of this domestic legislation with national and international law. There was also a view that this would develop a more consistent and independent monitoring arrangement across the whole prison estate.

6.17. There was also a view that the provision of assistance detailed in the Order would be dependent on a Governor's co-operation, which could vary or was not always forthcoming. Some respondents also thought that the phrasing of the order was too subjective and that the nature of the assistance was unspecified, with concern over how the proposal would work in practice being raised. Some concern was also expressed over the ability of the provision to effect change where a Governor is intent on non-co-operation, and argued that there was no sanction to be applied should a Governor not comply with the duty.

Complaints Handling

6.18. While views on whether the draft Order provided the basis for a clearer complaints-handling process were mixed, some respondents felt that the provision of such assistance was an important support and advocacy role. It was argued that the proposed provisions would clarify the IPMs role in the complaints process, reduce the potential for overlapping roles and processes, and strengthen the ability of IPMs to help prisoners but would not prevent IPMs from acting swiftly and informally in urgent situations.

6.19. Many respondents raised concerns that the existing statutory duty on VCs to hear and investigate complaints would not be retained for IPMs and they would be required to direct prisoners to the SPS system. There was also concern that IPMS would have difficulty in following up on the progress of complaints through the SPS system without a high level of co-operation from Governors. Concern was also expressed that without a confidential requests system, the ability of IPMs to investigate urgent matters would mean little. Some respondents also expressed a belief that the existing process worked well and did not require to be changed, arguing that the new arrangements would be less robust than the current system and compared unfavourably to arrangements elsewhere in the UK.

6.20. Some respondents also raised issues with the SPS complaints procedure which IPMs may assist prisoners with, stating that there was a lack of trust and confidence in the system by prisoners. Concern was also raised that there was a fear of retribution or recrimination by prisoners who used the system and that there was a prevalence of literacy problems within the prison which could lead to difficulties for prisoners using a paper-based system. Some respondents also questioned the effectiveness of the SPS system, its lack of confidentiality and inability to provide a quick resolution for some issues.

Prison Monitoring Advisory Group (PMAG)

6.21. Several respondents made positive comments or identified benefits of the inclusion of provisions relating to the establishment and composition of a PMAG, expressing a view that this was a practical and appropriate arrangement. There was also a view that a minimum number of IPMs being included in the group was welcome. It was suggested that the PMAG would bring consistency across the estate, support the effectiveness of different roles, ensure appropriate training to meet changing demands, ensure a more relevant and dynamic review process is embedded into all aspects of independent prison monitoring, provide a forum to raise common issues arising across areas, and enable a responsive process.

6.22. Concern was expressed by some respondents in relation to the composition and functioning of the PMAG. These respondents were concerned that the group would be weighted in favour of HMCIPS and would not provide a robust and transparent challenge mechanism. Some respondents raised that inclusion of IPMs was a ‘token gesture’ and any concerns they raised at the Group could be overridden. Some respondents also considered that the group would be managerial rather than advisory and have no function other than to support decisions already made, and independence would be comprised. There was also concern that such an arrangement would not be OPCAT compliant, and the group would not ensure that the system would be “future proofed” and “person proofed” as suggested.

Compliance with OPCAT

6.23. Most respondents who provided comments supported the inclusion of an explanation of the purpose of monitoring being in pursuance of OPCAT, recognising the importance of this and suggesting that as the country had signed up to the protocols, it was right that it was noted in the Order. Respondents felt that the inclusion would ensure that issues could not be overlooked and assist in understanding that independent prison monitoring is not a stand-alone function.

6.24. Concern was raised by some respondents that the inclusion of a reference to OPCAT created an illusion of commitment to the protection of human rights by the Scottish Government, which was not borne out by the provisions of the draft Order. Some respondents also considered that the new system was still not OPCAT compliant, or that the provisions in the Order did not go far enough and should include further detail in terms of the key elements set out by OPCAT.

Visits by SPT

6.25. Most respondents who provided comments supported the outlining of Scottish Ministers’ duties regarding SPT Visits, suggesting that this would place responsibility on Scottish Ministers to ensure access to Scottish prisons as appropriate.

6.26. There was a view that the wording of the section in relation to visits by the SPT could undermine the independence of the SPT during its visits by including the qualification “anything which the Scottish Ministers consider necessary”.

Transitional Period

6.27. Most respondents made some positive comments in relation to the inclusion of a transitional period. There was a view that it reflected good practice for VCs to be allowed to conclude any ongoing work and it would have been detrimental to the changeover if such a transitional period was not included.

6.28. Some respondents commented on the perceived inconsistency of the Scottish Government suggesting a three month transition period to ensure the completion of VC annual reports, while omitting a provision for annual reporting in the new system. There was also some concern about whether the successors to the VCs would be ready within a three month timescale or whether this would be enough time to get the new system up and running effectively.

Nature of the Change Process

6.29. Some respondents expressed support for the changes that had been made to the revised draft Order with a view that some of the changes which had been made had satisfied issues which respondents had raised previously. There were also comments made about the perceived need for reform of the current system with a number of benefits of the proposed changes being raised as: consistency of process, compliance with OPCAT, general effectiveness of the new approach, and the potential for this to drive continuous improvement through co-ordinated independent prison monitoring, communications, training and data capture.

6.30. Concern was expressed over the lack of action to implement recommendations from the 2007 review of Prison Visiting Committees and a perceived disregard of some of the recommendations made by Professor Andrew Coyle in 2013. There was also a view that frequent changes to the draft Order had confused the situation, without addressing the issues despite the time it had taken, and which had resulted in uncertainty and a reduced number of VC members. Some respondents also believed that there was a heavy reliance on the Implementation Group in developing guidance to supplement and replace legislative provisions, and that Government representatives were in the majority on the group and views expressed by other members given little weight.

The Consultation Document

6.31. Some respondents were of the view that the questions posed in the consultation were narrowly focussed and worded to support the Order to avoid reopening particular issues. There was also a view that the consultation did not make clear what the main changes were when compared to the current arrangements.

The Consultation Process

6.32. Concerns were also expressed that views would be disregarded or not taken into account, with some believing that the consultation period was too short. Some respondents suggested that the Scottish Government Consultation Report on the original period of consultation, was misleading and views of other bodies, e.g. the Justice Committee, had been mis-represented. There was also criticism that this report was not published until the period of further consultation began and that there was a perceived lack of information on why the Government had not included particular issues.

Nature of the Proposals

6.33. Some respondents raised concern that the draft Order did not meet some of the pre-conditions required by the legislative process. Concerns were raised that the general focus of the Order was on inspection and not monitoring, there was too much emphasis on guidance rather than legislation, the Order did not go far enough to ensure the independence of PMCs and IPMs, the proposed system would make it harder for prisoners to exercise their rights and there would be a lack of trust in, and credibility of, the new system.

Cost.

6.34. Concerns were raised that the new system will be more expensive than the current system and it was questioned whether this will represent better value for money. Some respondents considered that the Government had not provided enough information on how much they expected the proposals to cost.

Section 27(1)(f)(iii): Changes made to the proposed draft Order as a result of representations received

6.35. The following changes were made to the proposed draft Order in light of the responses received during the second consultation.

Changes to the Preamble

6.36. As the Draft Order now contains a power of legislating, the Scottish Ministers may not make the Draft Order unless, under section 20(3), they comply with the conditions in section 20(4) and (5). The preamble has been amended to confirm that the Scottish Ministers consider these conditions to be satisfied.

Changes to the amendments to the 1989 Act

Section 7

6.37. A number of minor stylistic changes have been made to the amendments to section 7. The Chief Inspector is now being given a function of inspecting the arrangements for the temporary release of prisoners in accordance with the Prison Rules. The intention behind this is to remove any doubt that the inspection of prison conditions and the treatment of prisoners includes these arrangements. It is not considered that the Chief Inspector's existing powers exclude these arrangements but an express provision is considered to be appropriate.

6.38. The Chief Inspector previously had an implied power to issue instructions to PMCs by virtue of the obligation on PMCs to comply with those instructions. Section 7(2)(e) has been added giving the Chief Inspector an express power to instruct PMCs in relation to the exercise of their functions.

6.39. The power of the Scottish Ministers to direct the form and timing of the Chief Inspector's reports has been clarified in new subsection (4).

6.40. The duty on the Chief Inspector to lay reports before Parliament has been extended so as to oblige the Chief Inspector to lay the Chief Inspector's annual report on independent prison monitoring before Parliament along with the annual reports received from PMCs. This is to give Parliament a chance to scrutinise the arrangements for independent prison monitoring – PVC annual reports are not currently laid before Parliament under the 1989 Act or the Prison Rules.

6.41. The powers to speak with any person at the prison in sections 7(6)(b), 7B(5)(b) and 7D(6)(b) have all been clarified to the extent that the person agrees to speak with the Chief Inspector, PMC or IPM.

Section 7B

6.42. A number of minor stylistic changes have been made to section 7B. Section 7B(2)(d) has also been amended to allow investigations under that provision to be conducted by individual IPMs or by groups of IPMs. Section 7B(3) has been added to ensure a minimum number and frequency of visits by IPMs and to allow PMCs to instruct group visits by IPMs. The rota of visits prepared by PMCs must at least provide for weekly visits to the prison by one IPM. This reflects the current arrangements for PVCs in rule 151 of the Prison Rules and is intended to represent a minimum standard – PMCs will be able to provide for more frequent visits.

6.43. The reporting duties conferred on PMCs have been extended so as to oblige the PMC to prepare an annual report to the Chief Inspector on the conditions, and the treatment of prisoners, in each prison to which they are assigned. The power of the Chief Inspector to direct the form and timing of the PMC's reports has been clarified in new subsection (7).

Section 7C

6.44. Section 7C has been amended so as to clarify the rules on re-appointment of IPMs. An IPM may be re-appointed but is not allowed to be an IPM for more than 9 years (consecutively or otherwise).

Section 7D

6.45. A number of minor stylistic changes have been made to section 7D. Section 7D(1)(c) has been added to ensure that IPMs can monitor the arrangements for the temporary release of prisoners under the Prison Rules. Section 7D(3) has been added to clarify that IPMs may investigate matters referred to them by a prisoner. This makes it clear that the IPM's role in the prison complaints process under the Prison Rules does not impinge on the more general monitoring duties contained in subsections (1), (2) and (3).

Sections 7E and 7F

6.46. A number of minor stylistic changes have been made to sections 7E and 7F.

Section 7G

6.47. Subsections (2), (4) and (6) have been removed from section 7G as they are considered unnecessary. Section 7G(1)(d) has been added to ensure that the SPT can monitor the arrangements for the temporary release of prisoners under the Prison Rules.

Other consequential changes

6.48. A number of minor stylistic and consequential changes have been made to the remaining amendments of the 1989 Act.

Changes to the amendments to the 2010 Act

6.49. A number of minor stylistic and consequential changes have been made to the amendments to the 2010 Act. The amendments to Schedule 5 now include the addition of an entry for the prison monitoring advisory group in accordance with section 14(6)(a) of the 2010 Act as it is a body created under section 14(3)(c).

Changes to the amendments to the Prison Rules

6.50. A number of minor stylistic and consequential changes have been made to the amendments to the Prison Rules.

Changes to the incidental, transitional and saving provisions

6.51. A number of minor stylistic and consequential changes have been made to the incidental, transitional and savings provisions. The word “incidental” has been added to the title to reflect the provision for the abolition of visiting committees which is not strictly a transitional or savings provision.

6.52. A new subsection (2) has been added to ensure that where the Scottish Ministers request a visiting committee to inquire and report in accordance with rule 149(1), that inquiry and report must be concluded by the relevant date. This will enable the Scottish Ministers, should they consider it necessary prior to the coming into force of the Order, to request one final report from visiting committees on prison conditions and the treatment of prisoners. The annual visiting committee report for 2015 must be delivered to the Scottish Ministers as soon as possible after 31st March 2015 so this new subsection would allow a further report to cover the period between the date of the annual report and the discontinuance date.

6.53. Savings and transitional provisions have also been added for LPCVCs which were inadvertently omitted from the previous draft. The relevant date has now been set as the date falling three months after the coming into force of the Order.

Changes to the consequential amendments in the Schedule

6.54. A number of minor stylistic changes have been made to the consequential amendments in the Schedule to the Draft Order.